148 U.S. 615

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~1353.~~ ~~949~~ ~~508~~ 173

J. S. CASEMENT AND COMPANY, PLAINTIFFS IN ERROR,

vs.

SAMUEL S. BROWN AND HARRY BROWN, PARTNERS
AS W. H. BROWN'S SONS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 14, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1353.

J. S. CASEMENT AND COMPANY, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 10, 1890.

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1 *Transcript—Case* # 3804.

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, Ohio, in said district, on the first Tuesday of October, being also the second day of that month, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and thirteenth—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

Samuel S. Brown and Harry Brown, Partners as W. H. Brown'- Sons, Plaintiffs,
vs.
John S. Casement, Philip H. Kelley, and Jerry Le Duke, Survivors of James C. McDonald, Dec'd, Late Partners under the Firm Name of J. S. Casement & Co., Defendants.
} # 3804.

2 Be it remembered that heretofore, to wit, on the 6th day of October, in the year of our Lord one thousand eight hundred and eighty-five, came the plaintiffs, by their attorneys, and filed in the clerk's office of said court their certain transcript from the common pleas court of Scioto county; which said transcript is in the words and figures following, to wit:

Transcript.

The State of Ohio,
Scioto County, } *ss:*

I, J. H. Simmons, clerk of the court of common pleas within and for said county, do hereby certify that the following is a correct transcript of the pleadings and the docket and journal entries in said court in the case of W. H. Brown'- Sons *vs.* John S. Casement and others, # 6145.

1884, March 29.—Petition filed, a copy of which is as follows, to wit:

Petition.

Samuel S. Brown and Harry Brown, Partners as W. H. Brown'- Sons, Plaintiffs,
vs.
John S. Casement, Philip H. Kelley, and Jerry Le Duke, Survivors of James C. McDonald, Dec'd, Late Partners as J. S. Casement & Co., Defendants.

The plaintiffs have been since prior to January 1, 1883, partners, as above stated, engaged in the business of mining coal and trans-

porting the same in boats and barges on the Ohio river, which is a
navigable river and a common and public highway for the
3 use of all persons at their free will and pleasure. On Febru-
ary 13th, 1883, they owned three barges containing 70,922
bushels of coal and the other property herein described. The barges and coal were of the value of \$7,801.42; the other articles were one check line, of the value of \$80.00; three ratchets, of the value of \$39.00, and four chains, of the value of \$33.60, the total value of all said property being \$7,954.02. Said barges were being towed by plaintiffs' steamer "Alarm" down the Ohio river past the town of Point Pleasant, West Virginia.

The defendants, in connection with the said James C. McDonald, since deceased, were then engaged in constructing a bridge across said river from said town of Point Pleasant to a point in Gallia county, Ohio, and had partially erected at various points in the channel of said river four stone piers, on which to support said bridge; thereby said river and the free use and navigation thereof as aforesaid were obstructed and rendered unsafe and dangerous.

On said date said piers were beneath the surface of the water and wholly concealed by the same, and were carelessly and negligently left by defendants without any buoys or light or other means to mark their location and to warn those navigating said river thereof.

Thereby, without the fault of plaintiffs, said steamer Alarm and
barges struck upon the western one of said piers and said barges
were sunk and with their contents were totally destroyed and
4 lost, to plaintiffs' damage in the sum of seventy-nine hundred
and fifty-four $\frac{2}{100}$ —, for which, with interest from Feb. 13,
1883, for costs and other proper relief, they ask judgment.

THORNTON M. HINKLE,
MOORE AND NEWMAN,
Att'ys for Plaintiffs.

STATE OF OHIO, }
Scioto County, } *ss:*

O. F. Moore, being duly sworn, says he is one of the attorneys for the said plaintiffs, W. H. Brown'- Sons, and duly authorized to act for them in the premises; that both of said plaintiffs are non-residents of said Scioto county and are now absent therefrom.

Affiant says he believes the statements and allegations of the foregoing petition of plaintiffs to be true.

O. F. MOORE.

Signed in my presence and sworn to before me by the said O. F. Moore March 29, 1884.

[SEAL.]

J. P. CROTES,
Notary Public, Scioto Co.

Not'y fee, 40c.

SAMUEL S. BROWN and HARRY BROWN, Partners as W. H. Brown'-Sons, Plaintiffs,
vs.
JOHN S. CASEMENT, PHILIP H. KELLEY, and JERRY LE DUKE, Survivors of James C. McDonald, Dec'd, Late Partners under the Firm Name of J. S. Casement & Co., Defendants.

Præcipe.

The clerk will issue a summons in the above-entitled cause and on said petition, returnable according to law, directed to the
5 sheriff of Scioto county for the said Philip Kelley, to the sheriff of Lake county for John S. Casement, and to the sheriff of Cuyahoga county for Jerry Le Duke; endorse suit brought to recover $7,954.02 damages, with interest thereon from February 13, 1883.

THORNTON M. HINKLE AND
MOORE & NEWMAN,
Attorneys for Plaintiffs.

Petition endorsed: I do hereby acknowledge and bind myself as security for costs in this action for the said plaintiffs, W. H. Brown Sons. D. N. Murray. March 29, 1884.

Summons, Scioto Co.

And thereupon — the præcipe of said plaintiffs the following summons was issued to the sheriff of Scioto county, to wit:

THE STATE OF OHIO, }
Scioto Co., } *ss:*

The sheriff of said county, Greeting:

You are hereby commanded to notify Philip H. Kelley (impleaded, &c.) that he has been sued by W. H. Brown'- Sons in the court of common pleas of Scioto county, and that unless he answer by the 26th day of April, A. D. 1884, the petition of the said plaintiffs against him filed in the clerk's office of said court such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 7th day of April, A. D. 1884.

5½ Witness my hand and the seal of said court, at Portsmouth, this 29th day of March, A. D. 1884.

WM. F. WHITNEY, *Clerk,*
By WM. A. HARPER, *Deputy.*

Endorsed: Suit brought to recover $7,954.02 damages, with interest thereon from Feb. 13, 1883. Attest: Wm. F. Whitney, clerk, by Wm. A. Harper, deputy.

6 *Summons to Lake Co.*

Same day summons issued to Lake county as follows:

THE STATE OF OHIO, } ss:
Scioto County, }

To the sheriff of Lake county, Greeting:

You are hereby commanded to notify John S. Casement (impleaded, &c.) that he has been sued by W. H. Brown'- Sons in the court of common pleas of Scioto county, and that unless he answer by the 26th day of April, A. D. 1884, the petition of the said plaintiffs against him filed in the clerk's office of said court such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 7th day of April, A. D. 1884.

Witness my hand and the seal of said court, at Portsmouth, this 29th day of March, A. D. 1884.

WM. F. WHITNEY, *Clerk,*
By WM. A. HARPER, *Deputy.*

Endorsed: Suit brought to recover $7,954.02 damages, with interest from Feb. 13, 1883. Attest: Wm. F. Whitney, clerk, by Wm. A. Harper, deputy.

7 *Summons to Cuyahoga County.*

Same day summons issued to Cuyahoga county as follows:

THE STATE OF OHIO, } ss:
Scioto County, }

To the sheriff of Cuyahoga county, Greeting:

You are hereby commanded to notify Jerry Le Duke (impleaded, &c.) that he has been sued by W. H. Brown'- Sons in the court of common pleas of Scioto county, and that unless he answer by the 26th day of April, A. D. 1884, the petition of the said plaintiffs against him filed in the clerk's office of said court such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 7th day of April, A. D. 1884.

Witness my hand and the seal of said court, at Portsmouth, this 29th day of March, A. D. 1884.

WM. F. WHITNEY, *Clerk,*
By WM. A. HARPER, *Deputy.*

Endorsed: Suit brought to recover $7,954.02 damages, with interest thereon from Feb. 13, 1883. Attest: Wm. F. Whitney, clerk, by Wm. A. Harper, deputy.

8 *Sheriff's Return, Scioto County.*

And afterwards, to wit, on the 3rd day of April, 1884, summons to Scioto county was returned as follows:

"Received this writ March 31, A. D. 1884, and, as commanded therein, I, on the 3rd day of April, A. D. 1884, served the within-named Philip H. Kelley by delivering to him personally a certified copy of this writ, with the endorsements thereon, and I hereby return the same, dated this 3rd day of April, A. D. 1884.

Fees 81c.

A. J. FINNEY,
Sheriff, Scioto Co., O.,
By W. S. FOSTER, *Deputy.*"

Sheriff's Return, Cuyahoga County.

1884, April 4.—Summons to Cuyahoga county returned, endorsed as follows:

"On the 2nd day of April, 1884, I served this writ on the within-named Jerry Le Duke by delivering to him a certified copy thereof.

Fees 3.18.

E. D. SAWYER, *Sheriff,*
By BYRON POPE, *Deputy.*"

Sheriff's Return, Lake County.

1884, April 9.—Sum's to Lake county ret'd:

Received this writ on April 1, 1884, at 9 o'clock a. m., and on April 4, 1884, I served the same on the within-named defendant, John Casement, by delivering to him a true and certified copy thereof, with the endorsements thereon.

9 A. D. BARRETT, *Sheriff.*

1884, April term, June 30th.—Continued.
" October term, Dec. 19.—Continued.
1885, January term, Jan'y 29th.—Leave to answer forthwith.
1885, January term, Feb'y 6.—Continued.
1885, February 11.—Answer filed, to wit:

STATE OF OHIO, *Scioto County:*

Court of Common Pleas.

SAMUEL S. BROWN and HARRY BROWN, Partners as W. H. Brown'-Sons, Plaintiffs,
vs.
JOHN S. CASEMENT, PHILIP H. KELLEY, and JERRY LE DUKE, Survivors of James C. McDonald, Late Partners as J. S. Casement & Co., Defendants.

Answer.

The said John S. Casement, Philip H. Kelley, and Jerry Le Duke, survivors of James C. McDonald, late partners as J. S. Casement & Co., defendants, with leave of court, now come and, for answer to the said plaintiffs' petition, say they have no knowledge as to the sinking of the barges loaded with coal nor as to the value of said barges & coal & other property in said petition specified nor as to the ownership of the same nor as to any damage or the extent of any damages sustained by plaintiffs other than from the averments of said petition, and therefore they cannot admit but do deny each and all of said averments.

They admit said firm of J. S. Casement & Co., as contractors with the Pomeroy and Ohio River Railroad Co. and the Point
10 Pleasant and Ohio River Railroad Co., *they* built certain
piers in the Ohio river for a bridge for said railroad companies across said river from said town of Point Pleasant, in West Virginia, to a point opposite, in Gallia county, Ohio, but they say that with respect to the places where said piers were located and as to the time and manner of doing the work they at all times were required to act and did act under the immediate supervision, direction, and control of the engineer of said railroad company in charge of said work. They say the building of said bridge, as the same was constructed, was duly authorized by law. Said piers were built at the points designated by said engineer, who also acted under the direction of the duly authorized engineers and officers of the United States Government. Defendants deny that the erection of said piers obstructed the free use and navigation — unsafe or dangerous. They deny that said piers were so concealed by water or otherwise as to prevent their location from being plainly marked and well known. They deny that the same have been either carelessly or negligently left by them without buoys or lights to mark their location, but on the contrary the locations of all of said piers were plainly visible and well known to all persons navigating said river, and especially to the plaintiffs.

They say that if it is true that plaintiffs' boat and barges at the time stated struck upon the western one of said piers it was by
reason of the negligence and carelessness of the plaintiffs—
11 their officers and servants in charge of the same; that said
pier was not in the channel of the river or at a point where said boat and barges should have been run in navigating said river,

and the plaintiffs, their officers and servants, in so running the same were guilty of great carelessness and negligence, contributing directly to the injury complained of, and are not entitled to recover of defendants said damages or any amount whatever.

W. A. HUTCHINS,
Att'y for Defendants.

SCIOTO COUNTY, *ss:*

Philip H. Kelley, one of the above-named defendants, being sworn, says he believes the statements and averments of the foregoing pleading to be true.

P. H. KELLEY.

Signed and sworn to by the said Philip H. Kelly in my presence and before me Feb. 11, 1885.

WM. F. WHITNEY,
Deputy Cl'k.

1885, March 23.—Depositions in behalf of plaintiffs filed.

1885, March 30.—Reply filed as follows:

Reply.

W. H. BROWN SONS, Plaintiffs,
vs.
JOHN S. CASEMENT *et al.*, Defendants.

12 The plaintiffs, for their reply, say that they have no personal knowledge in respect to any direction or control exercised over defendants by the engineers of said railroad companies as to the places where said piers were located and as to the true manner of doing said work, and cannot therefore admit, but do deny, that said engineer did direct and control defendants as to the places where said piers should be located or as to the time and manner of doing said work; and they say further that even if it were true that defendants were so under the direction and control of the engineer of said railroad companies they deny that by reason thereof said defendants were relieved of responsibility for losses and damages resulting from their carelessness and negligence in the construction of said piers and in failing to take the necessary steps to notify plaintiffs of the dangerous condition thereof. They deny that it is true that plaintiffs and those in their employ in running said steamboat and said fleet of boats in tow were guilty of any carelessness or want of skill in passing said piers which contributed to the loss and damage incurred, or that anything else than the carelessness of defendants in erecting said piers and leaving them without providing the necessary guard or warning to plaintiffs and their employees of damage in passing the same caused the loss and damage complained of.

T. M. HINKLE,
MOORE & NEWMAN,
Attorneys for Plaintiffs.

13 STATE OF OHIO, *Scioto County,* } *ss:*

O. F. Moore, being duly sworn, says he believes the facts stated in the foregoing reply to be true. He further says that plaintiffs and each of them are non-residents of this county, and that affiant is one of their attorneys and is duly authorized to act for them in the premises.

O. F. MOORE.

Signed in my presence and sworn to before me by the said O. F. Moore March 30, 1885.

J. P. CROTES,
Notary Public, Scioto County, Ohio. [SEAL.]

Fee, 25c.

1885, April 10.—Depositions in behalf of plaintiffs filed.

1885, May 12.—Petition to remove case to U. S. court as follows:

Petition to Remove.

In the Court of Common Pleas of Scioto County, Ohio.

SAMUEL S. BROWN and HARRY BROWN, Partners as W. H. Brown's Sons,
vs.
JOHN S. CASEMENT, PHILIP H. KELLEY, and JERRY LE DUKE, Surviving James McDonald, Deceased, Late Partners as J. S. Casement & Co., Defendants.

To the honorable the judges of said court:

14 The petition of Samuel S. Brown and Harry Brown, partners as W. H. Brown's Sons, respectfully shows that the above-entitled suit is one of a civil nature at law where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred ($500) dollars.

That there is involved in said suit a controversy between citizens of different States, your petitioners, the plaintiffs, each being citizens of the State of Pennsylvania and the said John S. Casement, Philip H. Kelley, Jerry Le Duke each being citizens of the State of Ohio, of which State the said James C. McDonald, deceased, was also a citizen; that each of said plaintiffs was when said suit was instituted and still is a citizen of the State of Pennsylvania and each of said defendants when said suit was instituted was and still is a citizen of the State of Ohio.

That your petitioners further show that they have reason to l
lieve and do believe that from prejudice or local influence they w
not be able to obtain justice in said State court, and an affidavi
herewith filed to that effect.

That this petition is filed before the trial of said cause and at
term at which the said cause would first be tried and before the
thereof.

That your petitioners file this petition for the purpose of removing this case to the circuit court of the United States for the southern district of the State of Ohio under the provisions of the act of Congress in such cases made and provided.

15 Your petitioners further present herewith for approval and to be filed a bond, with good and sufficient sureties, for the entering by them of the record, pleadings, &c., of this suit in said circuit court on the first day of next session and for paying all costs that may be awarded by the said circuit court if said court should hold that this suit has been wrongfully or improperly removed thereto.

They therefore pray that said bond may be approved and said suit ordered to be removed.

W. H. BROWN'S SONS,
By HARRY BROWN.

Personally came before me Harry Brown, one of the plaintiffs, who, being by me duly sworn, says that he is one of the plaintiffs in this case, and that the allegations contained in the foregoing petition are true and correct, and that the said plaintiff verily believes and this affiant verily believes that the plaintiffs, from prejudice or local influence, will not be able to obtain justice in said State court of the State of Ohio in which the above case is pending.

HARRY BROWN.

Sworn and subscribed before — this 22d day of April, A. D. 1885.
S. C. McCANDLESS,
[SEAL.] *U. S. Commissioner, Western Dist. of Pennsylvania.*

16 *Bond.*

In the Court of Common Pleas of Scioto County, Ohio.

SAMUEL S. BROWN and HARRY BROWN, Partners as W. H. Brown's Sons, Plaintiffs,
vs.
JOHN S. CASEMENT, PHILIP H. KELLEY, and JERRY LE DUKE, Surviving James McDonald, Deceased, Late Partners as J. S. Casement & Co., Defendants.

Whereas, upon the petition of plaintiffs, an order has been made for the removal of the above cause into the circuit court of the United States, in accordance with an act of Congress in such cases made and provided:

Now, know all men by these presents that we, Samuel S. Brown and Harry Brown, trading and doing business as W. H. Brown's Sons, and David N. Murray are held and firmly bound unto the defendants in the sum of five hundred dollars ($500) upon condition that if the plaintiffs shall enter in the circuit court of the United States for the southern district of Ohio on the first day of its next session copies of all processes, pleadings, depositions, testimony, and other proceedings in this suit and shall pay all costs that may be awarded by the said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals this 22nd day of April, A. D. 1885.

W. H. BROWN'S SONS, [SEAL.]
By HARRY BROWN.
17 HARRY BROWN. [SEAL.]
D. N. MURRAY. [SEAL.]

Signed and sealed in the presence of—
S. C. McCANDLESS,
J. W. FULTON, Jr.,
As to D. N. Murray.

Order of Removal.

1885, April Term, May 14th.

Said plaintiffs herein, within the time provided by law, having filed their petition and affidavit for the removal of this case to the circuit court of the United States, and having at the same time offered good and sufficient surety pursuant to the statute, the court finds that the plaintiffs are entitled to such removal, does hereby accept said petition and bond, and orders that the said cause be removed for trial into next circuit court of the United States for the southern district of Ohio pursuant to the statutes of the United States, and all further proceedings in said cause in this court are hereby stayed.

Depositions filed April 10, 1885.

Notice.

State of Ohio, }
Scioto County, } *ss:*

Samuel S. Brown and Henry Brown, Partners as W. H. Brown's Sons, Plaintiffs,
vs.
John S. Casement and Others, Survivors of J. S. Casement and Company, Defendants.
} Case # 6145.

18 Pending in court of common pleas, Scioto county, Ohio.

The above-named defendants will take notice that on Thursday, the 2nd day of April, A. D. 1885, the plaintiffs above named will take the depositions of themselves and sundry witnesses, to be used as evidence in the trial of the above cause, at the law office of D. T. Watson, room # 7 Bakewell law building, corner of Grant and Diamond streets, in the city of Pittsburgh, in the county of Allegheny, in the State of Pennsylvania, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

MOORE AND NEWMAN,
Attorneys for Plaintiffs.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is, by agreement, waived; also all exceptions as to time.

Done this 26th day of March, A. D. 1885.

W. A. HUTCHINS,
Attorney for Def't.

In the Court of Common Pleas of Scioto County, Ohio.

SAMUEL S. BROWN and HENRY BROWN, Partners as W. H. Brown's Sons,
vs.
JOHN S. CASEMENT and Others, Survivors of J. S. Casement and Company.
} # 6145.

19 It is hereby agreed between counsel that the deposition of Benjamin F. Hall, taken down by L. H. Mathews, stenographer, before Charles S. Crawford, Esq., a notary public in and for the city of Pittsburgh, county of Allegheny and State of Pennsylvania, this second day of April, A. D. 1885, shall be admitted as evidence on the trial of said cause, and the signature of said deponent thereto is hereby expressly waived.

D. T. WATSON,
Att'y for Plaintiffs.
WILLIAM L. PEIRCE,
Of Counsel for Defendants.

In the Court of Common Pleas of Scioto County, Ohio.

SAMUEL S. BROWN and HENRY BROWN, Partners as W. H. Brown's Sons,
vs.
JOHN S. CASEMENT and Others, Survivors of J. S. Casement & Company.
} # 6145.

Deposition taken on behalf of the plaintiffs, to be used in the trial of the above cause, this second day of April, A. D. 1885, at the office of D. T. Watson, Esq., Bakewell law building, corner of Grant and Diamond Sts., Pittsburgh, in the county of Allegheny and State of Pennsylvania, before one Charles S. Crawford, a notary public in and for said city, county, and State.

20 BENJAMIN F. HALL, a witness called on behalf of plaintiffs, being duly sworn by the uplifted hand, testified as follows, in answer to interrogatories propounded by D. T. WATSON, Esq.:

Q. Mr. Hall, what is your age?

A. My age is fifty-eight.

Q. What is your occupation?

A. Steamboat pilot.

Q. And how long have you been engaged as a pilot?

A. Since 1848.

Q. And whereabouts have you been running as a pilot?

A. Pittsburgh to Cincinnati, Louisville, Cairo, Nashville, and Saint Louis.

Q. Most of the time you have been occupied on what river?

A. On the Ohio.

Q. In what kind of navigation?

A. Steamboat navigation.

Q. Any particular branch of it?

A. Pilot and captain.

Q. As to the commodity towed or transported—that is, have you or not been specially engaged in the transportation of coal tows?

A. I have, sir, for the last fourteen years.

Q. With whom are you at present engaged now, Captain?

A. W. H. Brown's Sons.

Q. How long have you been working for them?

A. About fourteen years (14) I think. I think it is about fourteen or thirteen years.

21 Q. Will you state the names of some of the other persons
or firms you have worked for?

A. I was packeting one year before I was employed by them. I was running the steamboat "Albian."

Q. Before that you were engaged with whom?

A. Big Sandy Packet Company.

Q. Between what points did you run?

A. Parkersburgh and Cincinnati.

Q. In February, 1883, were you engaged with the plaintiffs in this case?

A. Yes, sir.

Q. What were you running on at that time?

A. I think it was the Charles Brown that I run on at that time.

Q. Did the Browns at that time own the steamer "Alarm?"

A. I believe they did; they built her.

Q. You can state whether there was a rise in February, 1883.

A. A very large one; yes, sir.

Q. Do you remember what time it reached Pittsburgh?

A. I don't know; I went out ahead of it.

Q. Is there any way, Captain, you can fix about the time in February you did go out?

A. I think I left about the 2nd week—about the first part of th 2nd week; along about that time.

Q. Can you fix the time with reference as to how long you we out before the steamer "Alarm" went out?

A. No, I cannot; because they went out after I did.

22 Q. Can you fix how long it was before this accident
you passed Point Pleasant?

A. I think I passed there three or four days before that. I know the river was raising very fast at the time I passed.

Q. You had what as a tow?

A. We had coal.

Q. Do you remember how much?

A. No, I don't; I was trying to study whether it was boats or barges, but I am not certain what it was; my impression is it was boats.

Q. You passed Point Pleasant when, what time—in the daylight or at night?

A. In the morning between eight (8) and nine (9).

Q. What was the stage of water at that point at that time?

A. At the channel pier about half of the top-course pier was out, as near as I can remember.

Q. Are you now referring to the right-hand channel pier, the pier this accident happened upon?

A. Yes, sir; the right-hand pier, going down.

Q. Whereabouts was there, if there was any other pier between that and the right-hand shore?

A. There was none; the other pier was on top of the shore.

Q. Was there any pier between the right-hand channel pier and the right-hand shore?

A. No, sir.

Q. Was there any on the shore?

A. There was one out at considerable distance.

Q. When you went down there or down through there three or four days before this accident, what was the condition of the right-hand pier as to being out of water?

A. It was just about a half a course of stone out—it was. The water was up to about half way on the top course of stone, I believe. If I remember aright, there was two or three loose rocks lying on the pier. I don't know for certain, but that is my impression.

Q. Was there any water around the shore pier?

A. I don't remember that. I did not take particular notice. It was up onto the edge of the bank.

Q. Was the river raising or falling?

A. The river was raising rapidly—the Kanawha.

Q. What effect does a raise in the Kanawha have on the Ohio?

A. If it should raise very rapidly it would have a tendency to deaden the water—the current up in the Ohio.

Q. You were not present at the time of this collision or accident?

A. No, sir.

Q. And you know nothing personally of the collision?

A. I do not.

Q. I want to ask, from your experience as a pilot and from what you saw of the condition of the right-hand channel pier, whether it would have been difficult or otherwise to have ected that pier from collision by a buoy?

his testimony is objected to as incompetent and irrelevant by sel for defendant.)

A. Yes; sir; it could have been done, I suppose, very easily.

Q. Please describe to us how it could have been done.

A. Well, to make it safe, you could have an iron bar with a big ring located on the top of the pier, with a small chain having a light piece of wood attached to the end of it. This piece of wood should be sharpened at one end and big at the other, so if anything would go down there it would go over it, and the wood would float back again and show there was something there to look out for.

Q. If there had been such a protection as you have named or noticed at this pier what would the effect have, been upon navigators?

A. They would have been very apt to have looked around there.

Q. When you went by there was no such buoy there?

A. No, sir.

25 Cross-examined by W. L. Pierce, Esq.:

Q. You were not there at the time of the accident, were you?

A. No, sir.

Q. Have you been in the habit of passing that point very frequently?

A. Yes, sir.

Q. Had you seen the erection of those piers?

A. Yes, sir; from the foundation up.

Q. Was it a matter well known to rivermen that these piers were being constructed?

A. Well, from the time they had commenced building in the river pilots generally knew of it. They passed up and down during the construction of the piers. I don't know that it was specially mentioned in the papers.

Q. How many boats at the time of the accident did you observe at this particular pier?

A. I didn't observe them any more particularly than the balance of the time. They worked at it during the summer driving in coffer dams, and, I believe, fixing to get them out of the road in low water.

Q. They had been some months at it at least?

A. It was a few months, but they was not very long putting it up.

Q. Was this pier erected in the regular channel?

26 A. It is very close to where the channel is; it is one side of the channel.

Q. Has the position of the channel been changed?

A. No, sir; not that I know of; nothing there to change the channel of the river that I know of.

Q. Was this part of the river navigable at low water where this pier is located?

A. Yes, sir; because they have landed stone right around it.

Q. I mean for coal boats.

A. Oh, no; there is no place navigable for coal boats at low water.

Q. I mean at a coal-boat stage of water.

A. If there was stage enough to float coal boats they could land them right there.

Q. You say that the position of this pier is not outside the regular channel of the river?

A. I say it is one side of the channel and the left-hand pier is on the other side. You have got to go between them.

Q. What is the width of the river between this pier and Point Pleasant?

A. Indeed, I don't know, sir, what the width is, but I understand between the piers is a fraction less than (500) five hundred feet.

Q. You don't know the distance across the river?

A. I do not.

Q. Was the distance from this pier clear over to the West Virginia side navigable for coal boats at this stage when you
27 passed down several days before this accident?

A. I would think it would not have been safe. I always make it a practice not to run over a break if there is room to get around.

Redirect examination by D. T. Watson, Esq.:

Q. Why don't you run over a break?

A. Because you are apt to hit on it somewhere.

Q. Can you state whether it is customary to give notice of the erection of piers in the papers?

(Objected to.)

A. The law requires it.

Q. I am not asking you so much as to the law as to the general practice?

A. Yes, sir; that is the practice.

Q. In the construction of a buoy such as you have named, is it an expensive thing?

A. No, sir; it is a very cheap thing.

Q. How much would it cost to construct such a buoy?

A. I suppose three or four dollars.

Q. You stated, Captain, before that the Kanawha river was coming out strong at the time you went down, two or three days before this accident?

A. Yes, sir; had commenced rising.

Q. Does the tendency of the Kanawha river coming out strong—is what—about the location of these piers?

A. It kills the current very much.

28 Q. What effect does that have in showing any break above these piers with the Ohio at a stage of five or six feet of water?

A. It would have a tendency to decrease the size of the break.

Q. Why so?

A. It kills the current.

Recross-examination by W. L. Pierce, Esq.:

Q. How much do these coal boats draw?

A. From seven to eight and a half feet, according to how deep they are loaded.

Q. And according to how much ice is frozen in them during the winter?

A. There was no ice in them. I have seen some go down as low as six and seven feet.

Q. Do you know whether these coal boats were heavily loaded at the time of the accident?

A. I don't think they were heavily loaded.

Q. Would it have been possible to put a buoy on this pier at low water?

A. Yes, sir.

Q. Would there have been any water there to float it?

A. Yes, sir.

Q. Did you ever see any coal boats pass through this particular spot before the pier was located?

A. I don't know; that would be a pretty hard question for me to answer.

29 - Q. I mean as near to the shore as that?

A. Yes, sir; I have landed right there with coal boats and tied to the foot of the timber right above the pier in high water.

Q. How far would you think this pier was from the one on top of the bank, where the bridge commences?

A. That would be pretty hard now for me to say; I never took particular notice.

Q. Is it a great distance or a small distance?

A. I should think probably not more than half the distance between the channel span.

Q. Is it one hundred and fifty (150) feet?

A. Well, I don't know.

The signature of this witness is waived by agreement of counsel.

THE STATE OF PENNSYLVANIA, }
Allegheny County, } *ss:*

I, Charles S. Crawford, a notary public in and for the county and
State aforesaid, duly commissioned and qualified, do hereby certify
that the above-named Benjamin F. Hall was by me first sworn, according to law, to testify the truth, the whole truth, and nothing but
the truth, and that the deposition — reduced to writing by L. H. Mathews, stenographer, and the signature of deponent was waived
30 by agreement of counsel, respectively, in my presence, and
was continued from day to day as above set forth; that said
deposition was taken at the time and place specified in the notice
hereto attached, and that I am not counsel, attorney, or relative of
either party or otherwise interested in the event of this suit.

[SEAL.] In testimony whereof I have hereunto set my hand and official seal this 6th day April, A. D. 1885.

CHARLES S. CRAWFORD,
Notary Public.

Received of W. H. Brown's Sons the sum of $8.00 in full of my fees.

CHARLES S. CRAWFORD.

ALLEGHENY COUNTY,
State of Pennsylvania, } *ss:*

I, J. O. Brown, prothonotary of the court of common pleas No. 1 in and for the county of Allegheny, in the Commonwealth of Pennsylvania, the same being a court of law and record, do by these presents certify that Charles S. Crawford, Esquire, before whom the foregoing deposition was taken and who has thereunto in his own proper handwriting subscribed his name, was at that time and is now a notary public in and for the Commonwealth of Pennsylvania, resident at Pittsburgh, county aforesaid, duly commissioned and
sworn and authorized by law to take acknowledge- administer
31 oaths, &c., to all whose acts as such due faith and credit are
and of right ought to be given throughout the United States
and elsewhere, and further that said instrument is executed in accordance with the laws of this Commonwealth.

In witness whereof I have hereunto set my hand and affixed the seal of the said court, at Pittsburgh, in said county, this sixth day of April, in the year of our Lord one thousand eight hundred and eighty-five, and of the Sovereignty of the United States of America the one hundred and ninth.

J. O. BROWN, [L. S.]
Prothonotary.

Depositions filed March 23, 1885.

STATE OF OHIO,
Scioto County, } *ss:*

W. H. BROWN'S SONS, Plaintiffs,
vs.
JOHN S. CASEMENT and Others, Surviving Partners of J. S. Casement & Co., Defendants. } Case # 6145.

Pending in Scioto com. pleas.

The above-named defendants will take notice that on Monday, the
16th day of February, A. D. 1885, the plaintiffs above named
32 will take the depositions of sundry witnesses, to be used as
evidence in the trial of the above case, at the law office of
Thornton M. Hinkle, Nos. 19 & 20 Commercial Gazette building, in the city of Cincinnati, in the county of Hamilton, in the State of Ohio, between the hours of eight o'clock a. m. and six o'clock p. m. of said day, and that the taking of the same will be adjourned from day to day between the same hours until they are completed.

MOORE AND NEWMAN,
Attorneys for Plaintiffs.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions as to time.

Done this 11th day of Feb., 1885.

W. A. HUTCHINS,
Att'y for Defendants.

Depositions of sundry witnesses taken before me, Albert Stephens, a notary public within and for the county of Hamilton, in the State of Ohio, pursuant to the annexed notice and at the time and place therein specified, to be read in evidence on behalf of the plaintiffs, W. H. Brown's Sons, in an action pending in Scioto common pleas, in which W. H. Brown's Sons are plaintiffs and John S. Casement and others, surviving partners of J. S. Casement and Company, defendants, Thornton M. Hinkle being present on behalf of plaintiffs and John J. Glidden on behalf of defendants. 33

William H. Hall, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

1st Q. Your name, age, residence, and occupation, and how long have you been engaged in this occupation.

1st A. William H. Hall; fifty years; Dayton, Ky.; pilot on the Ohio and Kanawha rivers for nearly 29 years.

2nd Q. State your experience while engaged in such occupation.

2nd A. I have had as much, if not more, experience than the majority of men in the same occupation; have been engaged during the last 29 years whenever there was work; have never been idle when there was any work to do in that line of business; have been engaged during all stages of the river from 15 inches up to 25 feet at Pittsburgh; have been employed in all kinds of boats from the largest to the smallest. I ran from Pittsburgh to Louisville, on the Ohio, and from Loup Creek to the mouth of the Great Kanawha river, on the Kanawha. 34

3rd Q. State whether or not, on Feb. 13, '83, you were one of the pilots on the steamer Alarm, coming down the Ohio river with a tow of coal, how many boats you had in tow, who they belonged to, and what happened, giving all the particulars.

3rd A. I was on watch at the time; six coal boats and a full flat. W. H. Brown's Sons, Pittsburgh, Pennsylvania, owned the boats and coal. On the morning of Feb. 13, '83, we left Wolf's Bar, where we had been laying during the night, which is about 24 miles above Point Pleasant, the steamer Dexter, with tow, following right behind us, the river being very high—over its banks. The morning was clear and calm; boats steering and handling well. Kanawha river, being so much higher in proportion to other streams, overflowed the banks of the Ohio river from 10 to 12 feet more than any place above there, deadened the current in the Ohio river so as to prevent showing any break in the water. This was unknown to us till we got down close to the mouth of the Kanawha river. We could see no breaks or buoys indicating where the piers of the bridge crossing

the Ohio river at Point Pleasant, West Virginia, were. My partner, Lester Chester, Captain Thomas Chester, an old, experienced
35 pilot; George Dippold, pilot of steamer Dexter, and some one
else belonging to steamer Dexter were in the pilot-house with me at the time of the accident. One of them asked how wide the space was between the piers; I think it was Captain Thomas Chester; I am not sure. I told him it was reported 500 feet, so it was understood.

(Counsel for defendant objects to statement of conversation between witness and Captain Chester as incompetent.)

George Dippold remarked: "She was all right; could see no break of the piers." There was some drift remaining in the river. I watched it very closely to see that it did not make any turn off its course. It is usual for drift in passing over breaks or what is called swirls in the river to turn around—that is, flop around—change its course—the drift that morning doing nothing of the kind. It was also usual when an obstruction was near the surface of the water drift will alter its course—that is, shoot to one side or other. Between 9 and 10 o'clock in the morning the middle boat of the fleet we had in tow struck the pier of Point Pleasant bridge—it was the channel pier next to the Ohio shore—sinking that one and the other one immediately behind it, and the forward one on the star-
36 board side of the boat. I have made a plan showing the
make-up of the fleet, the position of the steamer Alarm and of the various boats in the tow. This plan is hereto attached and made a part of my deposition, marked "A." There were six coal boats and a fuel fleet carrying fuel for the steamer. One of the boats in the plat numbered 2 stopped on top of the pier. I designated for the steamer Dexter that I was in trouble, she following immediately in our wake. She altered her course and passed by safely and assisted us in gathering the other three boats. Nos. 1, 2, 3 were sunk. I backed the boat and had number 4 alongside. Nos. 5 and 6 broke loose and the fuel fleet also broke loose. A corner of No. 4 was staved considerably. A man who seemed to be an authority about the bridge came out in a skiff and wanted us to back the coal boat over the bank, he saying there was over 8 feet of water on top of the bank on the Ohio side of the river. We did not do it, but saved the boat and took it on to market down the river.

Counsel for defendant objects to so much of said answer as is included between the word "Kanawha," in the 2nd page, 3rd line, and the word "between," on the 4th line, 3rd page, as not responsive to the questions and incompetent, and objects to all testimony as to conversations with parties as given in the answer.

37 (In this copy the words "Kanawha" and "between" above referred to are underscored with red ink.

J. N. SIMMONS, *Clerk.*)

4th Q. What was the condition or stage of water of the Kanawha river on the morning of Feb. 13, '83, when you passed it with the tow, as stated in your last answer?

4th A. It was extremely high.

5th Q. How much higher, if any, than the other streams?

5th A. Ten to twelve feet is as near as I can come to it.

6th Q. What effect did this have on the stage of the water in the Ohio below the mouth of the Kanawha?

6th A. It made the Ohio river that much higher than it was above in proportion. In other words, the Ohio river was about 35 feet above the mouth of the Kanawha and 50 feet below. It is impossible for me to give the exact number of feet.

7th Q. What distance below the mouth of the Kanawha is the Point Pleasant bridge?

7th A. Its about 5 squares above the mouth of the Kanawha.

8th Q. What effect did the outpouring of the unusual stage of water from the Kanawha have upon the appearance of the water of the Ohio river at the point where the Point Pleasant bridge
38 is located?

(Question objected to.)

8th A. It deadened the current. In other words, the current of the Ohio river below the mouth of the Kanawha river was six to seven miles per hour, while at the pier of Point Pleasant bridge at that time it could not have been more than three miles an hour. The water was smooth at the piers.

9th Q. Which one of the Point Pleasant bridge piers were then visible?

9th A. None of the piers between the banks were above the surface of the water or showed any signs or indications of their location. The first pier north of the one I struck on top of the bank of the Ohio shore was out of water considerably and was my only guide to make any calculations where the other piers were. I do not know the distance or space between the pier that was struck by the boat and the pier that was out of the water on top of the bank. I attach to this deposition and make part hereof a plat marked "1," which shows the location of the various piers on this bridge as it was finally built. "E" is the pier on the Ohio bank, part of which was visible, and "D" is the pier we struck. I cannot state how many feet of "E" was visible.

39 10 Q. How far beyond "E" did the water of the Ohio river extend over the banks of the Ohio—how far inland; how far was the top of the pier "D" below the surface of the water?

10th A. I should say about a quarter of a mile—it may have been more—beyond pier "E." Pier "D" was over six feet below the surface of the Ohio river.

11th Q. What indications were there, if any, in the appearan of the water over the top of pier "D" to show there was any su pier there?

11th A. None whatever.

12th Q. What buoys or lights were there to indicate the prese of a pier?

12th A. None whatever.

13th Q. Who was in charge as pilot of the steamer Alarm at the time of the accident?

13th A. I was.

14th Q. Who was in the pilot-house with you?

14th A. Lester Chester, my partner, as pilot, one of the pilots of the boat; Captain Thomas Chester, an old pilot, who was making a trip at the time with his son, Lester Chester being his son; George Dippold, one of the pilots of the steamer Dexter; some one else belonging to steamer Dexter, I do not know what his name is.

15th Q. How long had Lester Chester been a pilot?

40 (Question objected to.)

15th A. I have known him as a pilot for over twelve years; for how much longer he had been a pilot I do not know.

16th Q. What were you folks engaged in doing as you approached the bridge?

(Question objected to as incompetent.)

16 A. It is the usual practice of boat pilots on tow-boats to be in the pilot-house together to consult and assist each other when approaching or nearing a bridge; we were doing that and had done it on all other bridges we passed on the trip down.

(So much of the answer objected to as refers to custom amongst pilots objected to as not responsive to the question and incompetent.)

17th Q. What is the custom among pilots on steamers having in charge tows of coal coming down the Ohio river as they approach bridges or bridge sites with reference to piloting the tow past such points?

17th A. It is customary for both to be in the pilot-house together and assist each other in watching the shore and shape of the boat and do all that is in their power to pass such places safely by consulting and giving opinions about the current, which way the water draws, and watch the wind so that the pilot who is on watch can keep his boat in proper shape to navigate such place safely.

41 18th Q. What, then, were you and Lester Chester and his father doing as you approached Point Pleasant bridge, with reference to passing it?

18th A. We were consulting—talking, rather—about the bridge and keeping up the usual custom of pilots.

Adjourned at quarter to one o'clock this 16th day of February, 1885, to meet at a quarter to two o'clock same day.

COL. 37 19th Q. What is the effect of the presence of a pier wholly subrged by high water, so as to be but a short distance below the face, upon the water flowing above and upon any drift that may pen to be floating in the water?

4t9 A. A pier or any obstruction fastened in the bottom of the river, when it is submerged or wholly covered by water, will show tow, [illegible]s or swirls—that is, the surface of the water will not be smooth,

but will whirl around the obstruction in the bottom of the river, whatever it may be, pier or otherwise, when the water came against it, bulges over or makes a raise hardly perceptible to the naked eye, which makes a small surface of water below such obstruction lower than it is on top. Some breaks, where obstructions are near
42 the top of the water, will form what pilots call "tails;" other
obstructions will form "boils," no matter how deep down under the surface they may be. The smaller the boils indicates that the obstruction is far below the surface of the water. Drift or any floating substance in going over any obstruction where breaks or boils are will turn around—alter its course—especially fine drift or small drift. That was the kind that was floating that morning.

20th Q. State what was the character of the drift floating that morning over and in the region of this submerged pier and how it acted.

20th A. The majority of it was what is called fine drift, such as small trees, bushes, slabs, corn-stocks, and such stuff as that. It kept straight on its course, as if there was nothing in the way.

21st Q. State what is the usual and ordinary and proper course for pilots to steer boats having tows past points like that which you were passing at the time this accident happened, first describing the course and character of the river at that point.

21st A. The point is on the Ohio side. The river makes a slight curve there, and by a point I mean the inner line of the curve is on the Ohio shore—that is, the Ohio shore is the curved side
43 of — curve. When from a mile to a half above any bridge—
especially that bridge, — to get boat and tow a parallel line to the shore, gauging the distance that the pier may be from the shore, keeping straight with the current, watching the shore, boat, and tow closely to see that the boat and tow does not flank or drift away out from the shore or into the shore. Boats have to be stopped and backed to make them keep their shape when wind or cross-current affect them, but that did not have to be done on this occasion.

21st Q. How is it about passing a point or curve in the river like this one at Point Pleasant?

21st A. This point or curve in the river is always steered, boats driving right ahead, wind being favorable—there being no wind to interfere with the navigation of the boat.

22nd Q. Which is the better course in passing Point Pleasant, to keep the tow to the Point side or the other side of the river?

(Question objected to as leading.)

22nd A. The channel of the river at low-water stage is between piers A & B, on plat "1." Usually in going down with tow-boats, before bridge piers were built, we would go between B & C or near where pier B is. Since the piers have been built it compels
44 pilots to get tow-boats close up to the Ohio shore, from a half
to a mile above the bridge, and keep down parallel with that shore until after the piers have been passed. We are compelled to keep to the Ohio side because the channel span is on that side.

The witness says he would like to make some explanation about piers D & E.

Pier D at low-water mark, or 30 inches stage of water in the river, is on the dry shore—the edge of the water. Pier E stands just at the top of the bank. Do not know the exact distance between the piers D & E, but estimate it—my own ideas of—being about 150 feet.

23 Q. State what degree of care was exercised in steering the tow past this point upon the occasion of the accident, stating what you did.

(Objected to as incompetent.)

23 A. [All the care and precaution that could be taken] we knowing that the piers were covered and were all watching out for breaks or buoys. I got the boat and tow up to the Ohio shore—parallel with the shore, judging by the trees that were on the bank and gauging my distance accordingly [there was no objections or suggestions from either of the pilots that were in the pilot-house at that
time, but all appeared to be fully convinced that I was pur-
45 suing my right course].

Counsel for the defendant objects to so much of the above answer as is in brackets and suggests that it is incompetent.

24 Q. How long did you remain at the scene of the accident after it occurred?

24 A. We gathered up the other boats that were loose and went on down the river. It was about two hours in gathering up the boats.

25th Q. When did you return up the river past this point?

25th A. It was inside of ten days and during the high flood of '83.

26 Q. What was the condition of pier D then?

26 A. It was out of the water about four courses of stone. There was a buoy on it—a frame to hang a light on it.

27 Q. Where was this buoy situated?

27 A. On top of the pier; similar ones floating over other piers, C and D.

28th Q. State whether C and B were under water or not at the time.

28 A. They were.

29 Q. State whether or not this buoy was in any way fastened; and, if so, how, to pier D.

29 A. It was tied or anchored on top of the pier. The buoys over B and C were anchored on top of the piers—I mean by an
anchor, a chain or line fastened one end to the buoy, the other
46 to the rock, so that it, the buoy, would raise and fall with
the water.

30 Q. State the condition of the work at Point Pleasant bridge—how near it was to completion at the time of this accident.

30 A. Piers D, C, B, & A were in an unfinished condition. Pier

D appeared to be further advanced than either of the other three, they being at work at it before the river raised. The other piers I know nothing about—whether they were complete or not.

31 Q. State whether or not a buoy of the kind you describe could have been maintained at pier D during the time of the high water—Feb., '83.

31 A. It could. [Had there been such a buoy there I wouldn't have hit the pier.]

(Defendants object to, as not responsive to the question, that portion of the answer between the brackets.)

32 Q. What is the custom on the Ohio river and the usual and ordinary course with those building bridges as to placing buoys, lights, or other marks to indicate the location of piers?

Defendants object to question as incompetent.

32 A. It is the custom to have buoys in day-time, light at night, and red lights at that, to mark the obstructions of piers. [It was done at the Newport bridge and at the Bellaire bridge when they were building.]

(Portion between brackets objected to as not responsive and incompetent.)

47 33 Q. What pier bridges have been built on the Ohio river between Pittsburgh and its mouth?

(Question objected.)

33 A. One at Rochester, Penn.; Steubenville, Ohio; Bellaire, Ohio; Parkersburg, West Va.; Point Pleasant, West Va.; Newport and Cincinnati bridge, Southern railroad bridge, bridge across the falls at Louisville, one in construction at Sand Island, New Albany, Indiana; one in construction at Henderson, Kentucky.

34 Q. What precautions, so far as you know, were taken to indicate the location of piers during the progress of the work in the construction of these bridges?

Counsel objects to question as incompetent.

34 A. The Steubenville bridge was the first pier bridge built; less precaution at that bridge than any other. Newport bridge and Bellaire bridge, Parkersburg bridge, Southern railroad bridge—they kept buoys in day-time, red lights at night, all the time they were in construction, to the best of my knowledge.

Counsel for defendant objects to answer.

35 Q. State what knowledge you had on the subject referred to in the last answer—when and how often you saw those bridges in the process of construction.

48 35 A. Newport bridge—I passed it on an average of six times a week during two summers while it was in construction, being employed in a packet-boat at the time; Steubenville bridge—for two summers passed it six times a week while it was in

construction, being employed on a packet between Wheeling and Pittsburgh. Bellaire bridge and Parkersburgh bridge I saw a number of times, being employed on a packet-boat between Pittsburgh and Cincinnati a large portion of the time.

36 Q. What precaution did you observe at the time you saw those bridges taken to indicate the location of the piers?

Objected to as incompetent.

36 A. They usually had buoys in the day-time when submerged by water and red lights at night; with the exception of the Steubenville bridge they were kept there constantly, to the best of my knowledge.

37 Q. What act was done or omitted to be done by W. H. Brown's Sons or any of their agents or employes by reason of which this accident occurred?

37 A. None that I know of.

49 Cross-examination by J. J. Glidden for defendants:

1 Q. Had you kept your boat in the middle of the river would she not have passed down with perfect safety?

1 A. So far as I know she would [not knowing the height of any of the piers at that time].

Portion of answer in brackets objected to by defendant as not responsive to question.

2 Q. I believe, as shown by plat "1," that the river at that point at low water is 920 feet in width. Pier D, which you struck, stands on the Ohio side, at the edge of the low water and upon the bank. Is that correct?

2 A. No, it is not correct; it stands on the edge of the water of low-water mark. Taking 30 inches of water as the standard, that pier is about one-half in water and one-half on land. I have reference to the pier. From pier A to pier D it is 920 feet; adding the width of piers B & C to it would make it that much more.

3 Q. For what length of time immediately previous to the accident had you been running in the Pittsburgh and Cincinnati trade or any other that took you past this point?

3 A. About 26 years.

50 4 Q. What length of time had defendants been engaged in constructing this bridge pier to Feb. 13, 1883?

4 A. Can't say when they commenced; they were working on it during the summer and fall of 1882; my impression is that they commenced during the spring of 1882.

5 Q. How frequently during the progress of this work did you pass this point?

5 A. During the summer of 1882 up to Nov., 1882, I passed it twice a week, employed most of the time on the Ironton and Pittsburgh packet. When the river was low so she couldn't run to Pittsburgh she run from Wheeling to Cincinnati, passing the bridge twice a week on an average during that time. The navigation was obstructed part of the time with ice, but I passed it on the steamer

Kate Adams the early part of December, twice on the tow-boat Lioness and on the Will. S. Hayes in December; don't recollect having passed it during the month of January; I know I was past, not because ice obstructed navigation.

6 Q. What time in the fall of 1882 did the defendants suspend work upon the piers?

6 A. I don't know.

7 Q. Were they working on the piers in December?

51 7 A. I think they were when the weather would permit them; I couldn't say positively.

8 Q. Did they do any work during the month of January or could they?

8 A. I do not know whether they did any work or not during the month of January; there always appeared to be a gang of men around there ready to work.

9 Q. Could they work on piers A, B, C, or D when navigation was prevented by ice in the river?

9 A. They could on pier D; they could not on the others; I don't know about pier A; they could have worked on that if they had wanted to.

10 Q. When you passed there in December how far had they progressed with the work on piers B & C?

10 A. They appeared to have stopped work on pier C when cold weather set in; I can't give the height they were out of water, but from appearances they were pushing them as fast as they could.

11 Q. Is it not true that at that time piers B & C had been built but a few feet and that work had been abandoned on them for the winter?

52 11 A. My impression — piers B & C were twenty feet above the low-water surface of the river; about the work being abandoned I know nothing about.

12 Q. At that time how high was pier D above the surface of low water?

12 A. I cannot state in feet how high it was, but—my information and general knowledge of it—I thought it was about the same height as the others—B & C. It might have been some higher. It proved to be so afterwards.

13 Q. Was the river on the 13th of Feb., 1883, rising or falling at that point?

13 A. Falling.

14 Q. How long had it been falling, and when did it reach its extreme flood height?

14 A. Do not know how long it had been falling. I do not know when it reached its extreme flood height.

15 Q. Did the river not attain the greatest height of that flood at that point on the 12th day of February and commence receding the night or evening of the 12th?

15 A. Not being there at that time, I can't say.

16 Q. How much had the river fallen at that point at 9 o'clock on the morning of the 13th of February—about how much?

16 A. When we passed there between 9 and 10 o'clock that morn-

ing, as near as I could judge from the shore and at a place
53 where I could see it, I think the river had fell from eight to
ten inches. I can't give it exactly, for it's only guessing at
it with the eye.

17 Q. What was the difference in feet at that point between the surface at low water and the height the water attained in that flood?

17 A. I cannot give it positively in feet. I think it was in the neighborhood of 50 ft. It may have been much less—probably more.

18 Q. Why was it thus, if you supposed that pier D was not more than 20 feet above the surface of low water, and you knew that the river was 50 feet above the surface of the water, you were apprehensive of any danger in passing over pier D, and why should there be a consultation of pilots in regard to the matter? And in that connection please state the amount of water your barges were drawing.

18 A. My recollection of pier D—they had derricks on it, or had had a short time ago. The exact height of them we did not know or had no means of knowing. I did not know how much the height of the pier had increased since last been seen by any of the pilots that were in the pilot-house with me. It is customary for pilots to consult and assist each other on tow-boats at all bridges
and coming down-stream. The barges were drawing eight
54 and a half feet, to the best of my recollection. They were not
barges, but boats. There is a difference between barges and
boats.

19 Q. Then it was the derrick and not the pier that you were afraid of. Is that correct?

19 A. They are all one; but either one would sink the boat.

20 Q. Was there any derrick at either pier B or C?

20 A. No, sir; there was not, or I did not know it at the time.

21 Q. Then if you knew there was a derrick on pier D and none upon either pier B or C, and that neither pier B or C were over 20 feet high above the surface of the river at low water, why did you not steer your tow to the middle of the river and entirely away from all possible contact with pier D?

21 A. We do not steer boats or run them over any obstruction that may be in the river if it be possible to avoid it. Obstructions in the river—trees, whole trees—are liable to lodge on them. We always aim to go where there is no obstructions. The Kanawha river being so extraordinary high, making the Ohio river look like a lake to what it was to the part of the river we were in the day
before, the Ohio river showing a wider surface at Point
55 Pleasant on that morning to anything we had seen above that
point.

22 Q. Is it not true, Captain, by reason of the facts you just stated and your idea of the height of the piers, that you thought it perfectly safe and that there was no possible danger of your boat or barges touching these piers even if you did pass over them?

22 A. The height of the piers that I have given is only guessed

at. My idea is from the observations of the eye, and no pilot will run over any obstruction if he can possibly avoid it, and will always avoid it if he can see it or locate it, even if he knows or thinks that there is water over to pass over safely.

23 Q. In point of fact, Captain, did you not think that there was more than ten feet of water over the top of pier D at that time prior to the accident?

23 A. I did not think anything about it. How much water there was on top of the pier, I never had a thought of that kind. My sole aim and object was to get between the piers C & D, not taking into consideration how much water might be on them or not.

24 Q. Was not pier "E" and the pier on the Virginia shore, "F," both visible and both completed at that time?

56 24 A. Both were visible. Cannot say whether they were completed or not.

25 Q. What portion of the river does drift float in when the river is rising and what part when it is falling?

25 A. When the river is inside of its banks and rising it will float either on one shore or the other; it just depends on which way the wind is blowing generally; and when falling it will follow the shape of the channel as a general course, no wind interfering. When the banks are overflowing drift will follow to that side more than any other, as a general thing.

26 Q. In this instance both banks were overflowed, were they not?

26 A. The Ohio side the most; very little of the Virginia side at that point. The bank on the Virginia side is higher there than on the Ohio side.

27 Q. Is not the usual course of a tow-boat descending the river with a tow, when there is plenty of water in the river, to keep near to the middle of the river?

27 A. No obstruction in the river at a medium stage of water, it is; the higher the river is the more drift or set there is in bends. Then it is usual to keep them up toward the point.

28 Q. You knew about the distance from between piers
57 D and E, did you not—you had frequently seen them, as I understand you?

28 A. No, sir; I did not know the distance. I had frequently seen them, but never had any occasion before to measure or gauge my distance from pier E.

29 Q. You knew, did you not, that the width of the channel span between D & C was between four and five hundred feet?

29 A. I only knew by report that the space between C & D, what was known as channel span, — reported to be 500 feet of space.

30 Q. You gained no information, then, as to the approximate distance by passing it twice a week for several months?

30 A. None from nobody. When I passed the piers the coffer dams around the piers had very often flat-boats on the outside of them.

31 Q. Were the coffer dams around the piers when they were 20 feet above the surface of the low water?

31 A. I think they were. I do not think they were taken out till after the bridge was finished; can't say positively, though, as to that.

32 Q. What effect would the drift have upon maintaining buoys at the piers, especially pier D, on the occasion of such a flood as that of Feb., 1883?

58 32 A. If anchored with a chain, would not have any.

33 Q. How were you able to state in your examination-in-chief as to how the buoys that you saw floating over piers B & C were anchored?

33 A. I saw them with my own eyes. The usual way of putting a buoy of that kind, you take a chain or a line, make it fast to a big rock such as they had there and drop it on the pier, the other end being made fast to whatever was used for a buoy.

34 Q. Is it not true that your testimony upon that subject is from your general knowledge as to how buoys are anchored and not from any actual knowledge in this case, as you certainly could not see beneath the water?

34 A. We landed there on our up trip under pier D, close up to it, and I saw the buoys on pier C and B and the buoy on top of pier D, which was then out of water at that time. From what I seen of the buoy on top of pier D — that the other two buoys must have been the same way.

35 Q. Was the water at its highest more than four feet over pier D?

35 A. It was over six feet the morning we struck.

36 Q. How do you know that?

36 A. By the side of the boat that stopped on it. It was not raised more than two feet above the water, perhaps not that
59 much. The boat drew 8 feet of water. The forward boat
No. 1, as shown in the plat, drawing the same amount of water, was forced over the pier.

Adjourned at 6 o'clock this 16th day of February, 1885, to 2 o'clock Tuesday afternoon, February 17, 1885.

Redirect examination by THORNTON M. HINKLE:

1 Q. If there had been a buoy or other object at pier D to indicate its location, state whether or not that would have affected your steering and what would have been the result.

(Question objected to by counsel for defendant as incompetent and not proper for re-examination.)

1 A. It would have most assuredly *have* prevented me from striking the pier; the boat steering and handling well and the weather being calm, anything visible to the naked eye at the pier I could have avoided easily and would have steered clear of it. We were all watching for that very purpose.

(Answer objected to.)

60–62 2 Q. State what effect, if any, the rate of current prevailing during the flood of 1883, at this pier, would have upon any buoy located on the pier in the manner you described.

(Question objected to, same reason as last.)

2 A. The current was not such as to make it difficult at all to keep a buoy there, for the reason I have already given in this deposition. The current was not near as strong at that point as it was above or below and it would not affect a buoy properly placed.

WM. H. HALL.

Further taking of depositions adjourned by consent of parties to 2 o'clock Thursday afternoon, February 19, 1885.

H. STEPHEN,
N. P., H. Co., Ohio.

FEB. 19TH, 1885.

Adjourned — Tuesday, Feb. 24, 1885, by consent of parties.

ALBERT STEPHENS,
Notary Public, Hamilton County, Ohio.

63 Continued, pursuant to adjournment, at 11 o'clock a. m., Tuesday, Feb. 24, 1885.

HARRY BROWN, of lawful age, being by me first duly sworn and cautioned, deposes and says as follows:

Direct examination by THORNTON M. HINKLE:

1 Q. Your name, age, residence, and occupation.

1 A. Harry Brown; 28 years old; reside in Pittsburgh, Pennsylvania; coal miner and shipper.

2 Q. Are you one of the plaintiffs in this case?

2 A. Yes, sir.

3 Q. Who was the captain in charge of the fleet of tow-boats towed by the steamer Alarm which met with an accident at *the* Point Pleasant, on the Ohio, on Feb. 13, 1883?

3 A. Captain James Brookmire was in charge of the fleet.

4 Q. How many barges were sunk and their contents lost?

4 A. There were three coal boats, and not barges, *were* lost and their contents; their numbers were 621, 721, 724.

5 Q. Who owned these boats and the coal in them?

5 A. The firm of W. H. Brown's Sons, consisting of my brother, Samuel S. Brown, and myself.

64 6 Q. How much coal was in these barges and of what kind?

6 A. 70,922 bushels of Pittsburgh lump coal.

7 Q. How much of it was lost at this accident?

7 A. The entire quantity of it was lost, together with the boats.

8 Q. How long have you been in the business of mining and selling coal and shipping it to market down the Ohio river?

8 A. 9 years.

9 Q. State whether or not you are familiar with the value of such boats and coal at the time of this accident; and, if so, how much were they worth.

9 *Q.* Yes, sir; I am. Feb., 1883, coal was worth at Pittsburgh

from 10 to 10½ cts. per bushel per boat-load; that includes the boat and all.

10 Q. What was the value of this lot of coal and boats?

10 A. It was worth $7,450.81 at Pittsburgh at 10½ cents.

11 Q. Can you state the value of this coal and the boats at Point Pleasant at the time stated?

(Question objected to as incompetent.)

65 11 A. The price for towing coal from Pittsburgh to Cincinnati averaged between 1 ct. and 1¼ cts. per bushel. I would cost as much to tow from Pittsburgh to Point Pleasant as it would from Pittsburgh to Cincinnati, or within a fraction thereof.

(Answer objected to.)

Question repeated.

(Objection repeated.)

11 A. At least 11 cts. per bushel.

Cross-examination by J. J. Glidden:

1 Q. How do you arrive at the number of bushels of coal contained in these boats at that time?

1 A. By our pit weight.

2 Q. Did you personally weigh the coal?

2 A. No, sir; by our weigher at the mine, by whose weight we pay the miners.

3 Q. Have you any knowledge as to the amount of coal contained in these boats, except as you have been told or informed by your employee who weighed the coal at the pits?

3 A. Yes, sir; I have. I was not informed by any employee as to the amount of coal in these boats, except as recorded in our books at the mine and subsequently entered in our shipping
66 book.

4 Q. Then, if I understand you correctly, all that you know about the amount of coal contained in these boats is what is shown by the entries in the various books pertaining to your business, and those entries are the sole source of your information. Is that correct?

4 A. Not wholly.

5 Q. Please state what other source you derived information from on this subject.

5 A. I know that from official gauged reports of Cincinnati, Louisville, and New Orleans that about one hundred and seventy feet long, 25 feet wide, and 9 feet deep, inside in the clear, contains between 23,500 to 24,500 bushels lump coal. Such were the size of these 3 boats sunk or lost.

6 Q. Have you any personal knowledge, as contradistinguished from information obtained from other parties—that is, what they told you—and from the entries on your books, as to the amount of coal contained in these boats?

6 A. I have no information from other parties, except what I find

here entered upon our mine books as the amounts paid miners for the quantity of coal loaded in these boats. I did not weigh the coal myself.

67 7 Q. Your firm conducts a very large business, does it not, as miners and sellers of coal?

7 A. Yes, sir.

8 Q. What department of that business do you attend to?

8 A. I attend chiefly to the requirements of our mines, such as supplies, purchasing of boat bottoms, construction of boats and barges.

9 Q. By reason of the extent of your business. and the character of your duties in connection therewith is it not impracticable for you to have personal knowledge of the amount of coal shipped in any particular boat, and are you not necessarily compelled to depend and do you not depend for that information upon the parties whose duty it is to weigh the coal and to keep the accounts of that matter?

9 A. It is impracticable to recollect the exact amount in any particular boat, but our mine sheets show the exact amount weighed into each craft and by which sheet or record the miner is paid.

10 Q. Your testimony, then, as to the amount of coal contained in these boats is your recollection of what is shown by the mining sheet containing an account of that transaction?

10 A. From two of them—Nos. 721 and 724.

68 11 Q. Are not those mining sheets now in existence; and, if so, where are they?

11 A. I am not positive, but I think they are at our mines. They are in existence.

(Counsel for defendant here objects to all testimony of the witness upon the subject of the amount of coal contained in said boat, the cross-examination having developed that it is hearsay and secondary evidence.)

12 Q. What was the respective ages of these three boats that were sunk?

12 A. They were new boats on their first trip. I do not suppose they were a year old.

13 Q. To what point were they destined on this trip?

13 A. Memphis, Tennessee, or New Orleans.

14 Q. Had the cargo been sold?

14 A. No.

15 Q. How do you arrive at the value of coal and boats att Pittsburgh in February, 1883.

15 A. During that time—a rise in the river—the firm of Messrs. Geo. T. Miller & Bros. offered boat coal to me at 10 cents, delivered at Pittsburgh.

16 Q. Did you sell any coal at that time by the coal-boat load at Pittsburgh?

16 A. No, sir. We don't sell coal at Pittsburgh.

17 —. Did you purchase any coal at that time by the boat-load at Pittsburgh?

68*a* 17 A. No, sir; I did not, but I can't say positively that my brother did not.

18 Q. What price did your brother pay for the coal he purchased at that time?

18 A. I don't recollect at what price he paid for coal at Pittsburgh during that spring. I can only fix the price at what I was personally offered coal.

19 Q. Was there not a change in the price of coal at Pittsburgh during that rise—I mean from the time of the commencement of the rise until the water had again receded—and give different prices at different dates.

19 A. There was no change that I am aware of, as the coal loaded prior to that rise was loaded at the mining price of 3½ cts. per bushel, and seller's price at Pittsburgh is generally based on the price at which the coal was mined.

Redirect examination:

1 Q. What is the ratio between mining prices and selling prices?

1 A. The mining price at 3½ cents per bushel would make selling price about 6½ to 6¾ cents additional.

Recross-examination:

68*b* 1 Q. The selling price depends principally, does it not, upon those conditions which control the matter of supply and demand, sometimes being able to dispose of it a at good profit and at others compelled to sell it at but little profit or loss?

1 A. No, sir; not at Pittsburgh, as it is not a regular market. If the sellers do not obtain their price they tow or have towed their coal to lower ports, where they generally obtain their price above the minimum at which sales are made at Pittsburgh.

2 Q. Then the market at Pittsburgh is not in any sense a criterion of the value of the coal at points down the river, except, as you state, that they usually get more than the minimum price at Pittsburgh?

2 A. Yes, sir; I consider Pittsburgh prices a criterion for Louisville prices, with one-quarter cent per bushel added for risk, together with the towing.

3 Q. Is it not true that for the last 2 or 3 years the coal business, including the marketing of coal at points on the river below Pittsburgh, has not been a profitable business as it has been conducted generally?

3 A. We have found it to be a moderately fair profitable business. We have about held our own.

HARRY BROWN.

69 LESTER P. CHESTER, of lawful age, being by me first cautioned and sworn, deposes and says as follows:

Direct examination by THORNTON M. HINKLE:

1 Q. Your name, age, residence, and occupation.

1 A. Lester Chester; 48 years old; McKeesport, Penn.; pilot on steamboat on Ohio river.

2 Q. How long have you been a pilot?

2 A. 23 years.

3 Q. How much experience have you had and where?

3 A. I have been almost constantly on the river at that time between Pittsburgh, Penn., and Louisville, Ky., except when the river was frozen up or too low for navigation; have been piloting tow-boat with fleets of barges and coal in tow. My principal business was tow-boat pilot.

4 Q. Were you one of the pilots on the steamer Alarm, Feb. 13, 1883, when she was towing a fleet of coal boats past Point Pleasant?

4 A. I was.

5 Q. Where were you at the time the accident occurred to said fleet?

70 5 A. I was sitting in the pilot-house. I was not on duty; it was not my watch. Wm. H. Hall was on watch at that time.

6 Q. Who also was in the pilot-house and what were you doing?

6 A. George Dippold, Eckert, captain of the Dexter—she was following close behind—and my father. We were talking about the location of the piers and the width of the channel span and I was looking to see if I could see the break of the piers.

7 Q. State what was the condition of the water over and in the region of the piers to which you refer.

7 A. The surface of the water was smooth and no appearance of any breaks.

8 Q. What one of the piers could you see as you approached the Point Pleasant bridge?

8 A. The pier marked "E" on plat 1, attached to Captain Hall's deposition, on the Ohio shore, and the one marked "F" on the Virginia shore; I think it was standing there, if I am not mistaken, so as to be seen.

9 Q. What marks or buoys were there to indicate the location of the other piers?

9 A. There were none; none that I could see.

10 Q. What happened to the tow? Describe fully.

10 A. The centre boat in the tow forward number 1 on the
70a plat marked Exhibit "A," attached to Captain Hall's deposition, struck the pier and went over and sunk, number 2 lodging on top of the pier, and went to pieces, at the same time sinking either 3 or 4, I won't be positive. I think it was number 3 that sunk, breaking the tow all loose from the steamboat.

11 Q. How deep was the water over the top of pier D?

11 A. I thought at the time it was about six feet.

12 Q. How high was boat number 2 that rested on top of pier?

12 A. The whole side was about, I should judge, from 30 inches to 3 feet; the boat, when it was resting in the pier there, was about 30 inches above the surface of the water—about six feet of it below the water from the top of the pier to the surface of the water.

13 Q. I wish you would state exactly what precautions were taken

and what was done by those in charge of the steamer and her tow in order to safely pass the pier of this bridge.

13 A. We went down there and shoved over to the point to the Ohio shore to get to the channel span of the bridge—the widest span. We never, if it can be avoided, run over any obstruction of the river with a tow; knowing there were piers in the river at this point, we wanted to get into the widest space—the channel space.

71 14 Q. Who handled the wheel at the time?

14 A. Wm. H. Hall.

15 Q. What consultation, if any, did you and W. H. Hall and the other pilots hold with one another with reference to the course to steer?

15 A. I hadn't been down the river—passed those piers from December 24 or 25 to February at this time—and I didn't know whether they had been working on the piers or not in the meantime. I was sick during the trip before this. I asked Wm. Hall whether he was familiar with the piers of Point Pleasant bridge either that morning or the evening previous. He told me that he was familiar with the location of the piers; that he had been running on the Pomeroy trip on an average of twice a week, and when we were looking for breaks of the piers we couldn't see any breaks ahead of the tow and we concluded that she was all right and in the right course; that was about all we were talking about—the location of the piers.

16 Q. There is a slight curve in the Ohio river, is there not? On which side is the point?

16 A. The point is on the Ohio side.

17 Q. What is the proper course to take in steering a tow beyond or past such a point?

72 17 A. We always run closer to the point on account of the set in the bend from the point in a big river or high river. This is the proper course. Some short points we have to float.

Cross-examination by J. J. GLIDDEN:

1 Q. When you passed these piers, then in process of construction, about the 24th or 25th of December, 1883, what was the stage of the water in the river?

1 A. I think about 10 feet at that point—maybe 12 feet.

2 Q. What piers as shown by plat 1 were then so far constructed as to be above the surface of the water at that height?

2 A. I think they were all above water at that time at that stage of water, if I remember rightly.

3 Q. Of the piers A, B, C, & D, which then projected farthest above the surface of the water, and what was the approximate height of each above the surface of the water at that time?

3 A. I can't remember that. I think they were working at the piers C & D; I may be mistaken. That is my impression. I don't know that I can tell that. I don't think that I can tell the
73 height of either of them above the water only from hearsay afterwards. I can tell nothing from my own personal knowledge.

4 Q. I will ask you to refresh your recollection and ask you if it is not true that piers B & C were neither of them then so far progressed as pier D, and whether it is not true that piers B & C were then surrounded by coffer dams and neither of them at that time erected to the height of the then surface of the river?

4 A. There was a coffer dam around pier C that I remember, but the height of the pier I can't tell; don't remember. When I went down the river in December on the Charley Brown I did not know that they had piers built in the river at Point Pleasant until we came down to the bridge. I was in bed above. My partner was on watch, and I got up just as we came to the bridge, and my impression — that pier C was above water. It may be and may not be. It may have been the coffer dam that I saw. It was just before dark. I do not remember distinctly whether pier D was farther progressed than the others.

5 Q. Then, if I understand you, you did not pretend to be familiar with the location of these piers, but Captain Hall, the pilot who was at the wheel, stated that he did know their location,
74 he having passed there as a pilot in the Pomeroy trade twice a week. Is that correct?

5 A. Partly and partly not.

6 Q. In what particular is it correct and in what particular not correct?

6 A. I knew the location of the piers, but not the height of them nor how much work they had been doing on them in the meantime from the time I was down before to February 13. I knew that the pier D was to be built at the edge of the shore and, from hearsay, that pier C — 500 feet further out in the river.

7 Q. Is not the usual course of a tow-boat descending the river when there is plenty of water to keep near the middle of the river ordinarily?

7 A. It was before the piers were built on a moderate stage of water.

8 Q. If you knew that pier D was constructed to a height of 40-odd feet above the low-water surface of the river, and that piers B and C were constructed to a height not exceeding 10 to 20 feet above the surface of the river at low water, and you were descending the river with a tow at a stage of water of 50 feet, so that there could be but 4 to 6 feet of water over the top of pier D and from 30 to 40 feet of water over piers B & C, would you regard it
75 as prudent and careful navigation to run your course near enough to the location of pier D as to render a collision with that pier possible?

8 A. In the first place I didn't know whether pier D was so constructed. If I knew the height of the pier most any man would take the pier that is only ten feet high in preference to the one that is 40, if he knew it.

9 Q. If it be true that pier D was then constructed to such a height that there was but 4 to 6 feet of water over it and there was from 30 to 40 feet of water over piers B & C and the pilot at the wheel knew those facts, would not prudent navigation and ordinary

care require him to take a course near enough to the middle of the river at that point to make perfectly sure to avoid colliding with pier D, he being able to see piers E and F in the respective shores by which to guide his course?

9 A. I will answer that question this way: Pier E standing out on the bank above water and the bank covered with water from 6 to 8 feet deep, he was naturally deceived and mistook pier E for pier D, and shap*ing* his course accordingly from that pier, which he acknowledged right there when it was done that was the case, and at the same time kept a safe distance from pier C.

76 10 Q. Then I understand you, at the time of the accident or immediately thereafter, the pilot at the wheel, Captain Wm. Hall, stated that it had been caused by his mistaking pier E, standing out on top of the bank, for pier D, which stands at the edge of the low-water mark, and steering from that mistaken data he collided with pier B. Is that correct?

10 A. Yes; not immediately after—that evening, on account of the bank being covered with water, nothing to guide him but that pier E.

11 Q. Now, I will ask you, Captain, as pilot, if a pilot is engaged in running past an obstruction in the river such as these several piers constituted and passes them twice a week and knows that there are four piers—A, B, C, and D—located on and within boundaries of the river at low water and two piers—E and F—located on top of the bank, the pier E on top of the bank of the Ohio shore, the pier F on top of the Virginia shore, whether that pilot should not have a sufficient knowledge of these various obstructions and their several locations as that he should not mistake, if he exercised skill, the pier E on top of the bank for any of the piers located in the channel of the river, and particularly so when the river was at such a height that the only piers in sight are the two that are standing on top of the bank?

77 11 A. Any man of best judgment may sometimes be mistaken when the river covering the bank to the depth that it was that morning obliterat*ing* all marks of where the edge of the bank really was.

12 Q. Is it not a point of the education of pilots to correctly measure distance with the eye and to correctly judge the relative position of one object to another, and largely thereby to locate the channel and direct their course?

12 A. It is.

13 Q. If it be true that piers E & F were completed and the pilot knew that the tops of these piers were much higher than that of any of the other piers, and in high water he discovered that but two piers were visible above the surface of the river, should he not know that it was necessarily piers E and F?

13 A. If he knew that they were finished and knew that they stood on the bank and the distance from the edge of the bank they were he ought to be able to judge of the distance.

14 Q. If the pilot knew that the surface of piers E and F were higher above low water than the surface of either piers A, B, C, or

D and upon approaching the bridge in high water he discovered
that all the piers were submerged but two, would he not
78 necessarily know that those two piers were E and F?

14 A. Certainly.

15 Q. How soon after this accident did you again pass this bridge?

15 A. In about 10 days or less.

16 Q. At that time was not pier D, a portion of it, above water; and, if so, how much?

16 A. It was about 6 or maybe 7 feet; I don't know exactly; looking at it with the eye, maybe not so much.

17 Q. Were not piers B and C still submerged?

17 A. I think they were.

18 Q. Now, I will ask you, Captain, if on this occasion this tow had passed down, keeping near the middle of the river at that point, whether the accident would not have been avoided and the tow passed down in safety?

18 Ans. Knowing what I do now of the height of the pier at that time, they would have passed down safely.

19 Q. I will ask you, Captain, if it is not the duty of a pilot when
an obstruction or obstructions are being placed in the river to remain
there as fixed obstructions, as these bridge piers were, and in that
portion of the river which he is constantly navigating, passing the
point twice a week, to make himself thoroughly acquainted
79 with the exact location of each of these obstructions—I mean
by exact location their relative location to each other and
to the channel of the river?

19 A. He never goes to examine them only by passing them to and fro on his legitimate business. We sometimes come to that bridge by night and see the location of the bridge by lights. We are only familiar with them by passing and repassing them on our legitimate business.

20 Q. Is it not the duty of a pilot to make himself acquainted with and to know the location of the channel and all its permanent obstructions, whether natural or artificial, to the end that he may safely steer the vessel?

20 A. It is.

21 Q. If any obstruction is placed in the channel of the river where you are habitually navigating of such a character and so located as to possibly endanger the safe navigation by you or your vessel, do you not at once make yourself acquainted with its location and keep that location in your mind so as to enable you to avoid this new difficulty and safely navigate your boat?

21 A. We try to do it. (Sometimes we don't hear of an obstruction till we strike it.)

(Portion in parenthesis objected to as not responsive.)

80 Redirect examination:

1 Q. What is the distance from D to E?

1 A. 150 feet or 175 feet.

Question and answer objected to as secondary evidence.

2 Q. How long have you known Capt. Hall as a pilot?

2 A. For about 15 years.

3 Q. State what are the facts about his skill and ability as a careful and prudent pilot.

(Question objected to as incompetent.)

3 A. I never heard his ability as a pilot questioned. I always understood he was a number one pilot.

4 Q. What do you know about his skill and ability as a careful, prudent pilot?

(Objected to as incompetent.)

4 A. Never was in a boat with him but that one time on the Alarm. That trip he handled the boat as well as any one could have handled it down the river.

5 Q. State what negligence, mismanagement, or carelessness occurred on the part of Captain Hall or of any one else in charge of or on the steamer Alarm with her tow at the time of and just prior to this accident.

81 (Question objected to by counsel for the defendants as not proper on re-examination, as leading and suggestive, and as incompetent.)

5 A. [There was none whatever—negligence—but every precaution was taken to guard against accident. During that trip down, in view of the high water, we run only in day-time and laid up at night.]

Counsel for defendants objects to so much of answer as — in brackets because it doesn't pretend to state facts, but conclusions.

Question repeated.

Objection repeated.

—. There was no mismanagement or negligence or carelessness on the part of any officer in the boat that I know of.

Same objection as to former answer by counsel for defendant.

6 Q. What has been the custom of those building piers in the Ohio river for bridges such as this with reference to placing buoys or other objects to indicate their location, so far as you have observed the same during your experience as a pilot?

82 Counsel for defendants object to the question as not competent.

6 A. It has always been the custom to have a red light on them at night and a buoy that we could see by day. When they built the Beaver bridge they had a red light on at night in a flat anchored on the pier when they were covered; the same at Bellaire bridge, Parkersburgh bridge, and Newport bridge.

7 Q. State what indications there were of a mark or buoy at pier D when you next saw it after the accident.

Counsel for defense objects to question.

7 A. When we came back up the river there was, I think, a small flat lying on top the pier, with a line made fast to it and made fast to the top of the pier, with a stand in the flat for a light.

8 Q. How far inside of pier E did the water of the Ohio river extend at the time of this accident?

8 A. I can't say exactly, but think at least a hundred yards; that is my recollection of it. It may be more; it may be not so far.

9 Q. Counsel here reads cross-question seven and the answer. What is the usual course after these piers were built or commenced to be built and why?

83 (Question objected to for the reason that witness stated that prior to this accident he had never passed that point on a steamboat but once since the commencement of the construction of these piers, and his answer would necessarily be hearsay.)

9 A. Next to the point or up to the point; that has reference to a high stage of water, to guard against a set in the bend. The current tends to the bend in a high stage of water; the bend is the opposite side from the point.

10 Q. Where is the low-water channel at the bridge of Point Pleasant? Locate it by the lettering of the piers in plat 1.

10 A. Pier B, between piers B & C.

11 Q. What effect did the placing of piers D, C, B, and A in the river at Point Pleasant have as to where is the proper place to conduct a tow past this point?

(Question objected to as not proper in re-examination.)

11 A. The channel span was put on the point to make it easier and safer for tow-boats to run going down the river with heavy tows. If the channel span was in the bend side of the river it would be difficult to keep out of the bend with heavy tows.

84 Question repeated.

—. The proper place to tow would be next to the point.

Recross-examination:

1 Q. By your last answer you mean to say, as I understand you, that if the piers are constructed for the bridge, leaving a channel span, that it is proper to steer through that span. Is that correct?

1 A. Yes, sir; with a down-steamer tow. The other spaces are not wide enough to run them with a load of tow down steamer.

2 Q. Captain, was this a very heavy tow for the steamer Alarm—six boats?

2 A. It was a heavy tow, but I have taken down as heavy a tow with a less powerful boat—a smaller boat. The Alarm handled this tow very nicely.

3 Q. At the time of this accident you could see from the pilot-house of the boat, could you not, over the water to the high ground?

3 A. We could see the hill.

4 Q. Was it not a clear, bright morning?

4 A. It was a clear morning.

5 Q. You could see all objects of any considerable magnitude between your boat and the hill?

5 A. Yes; I believe I could; nothing to interfere; it was not smoky or foggy at that time.

85 6 Q. Would not the drift and other heavy substance carried upon the surface of the water in such a flood as this was be liable to carry away any buoy that might have been placed upon pier D or any of these piers?

6 A. My recollection that morning was that there was not much heavy drift in the river.

Question repeated.

—. Yes; it would be liable to do so.

7 Q. Now, I will ask you if at the time that you neared this pier D you didn't notice drift floating directly over it?

7 A. I don't think that I noticed that particularly.

8 Q. Did you return up the river after this accident upon the same boat the pilot, Captain Hall, was?

8 A. I did.

9 Q. What boat was it?

9 A. Alarm.

10 Q. What would be your estimate, Captain, of the extreme width of the surface of the Ohio river at the point of this accident at the time that it occurred from dry land to dry land?

10 A. Well, indeed, I couldn't answer that question. I have no idea. It is between one and five miles. I wouldn't pretend to say how wide it was on that day.

86 Redirect examination:

1 Q. What kind of a current was there that morning?

1 A. It was what I would call a mild current compared to what was below the mouth of the Kanawha river; there was not more than a current one to two miles an hour.

2 Q. State whether or not it was possible to so attach a buoy to pier D so as to prevent its being carried away by the current, drift, or anything else.

Question objected as witness has not developed that he is an expert in mechanical appliances.

87 3 Q. State whether or not you have known buoys to be so maintained at all stages of water.

Question objected to by counsel for defendant.

3 A. Yes, sir. The drift would not interfere with them properly constructed. I have seen two kinds of buoys—some a little flat with a line tied to it and drift would catch on it and it would tear loose—liable to tear loose; seen buoys constructed of a solid piece of wood made fast by a chain; drift would pass over and not catch them.

L. P. CHESTER.

THE STATE OF OHIO, } *ss:*
Hamilton County, }

I, Albert Stephen, a notary public in and for the county and
State above named, duly commissioned and qualified, do hereby
certify that the above-named Wm. H. Hall, Harry Brown, and Les-
ter P. Chester were by me first severally sworn to testify the whole
truth and nothing but the truth, and that the depositions by them
subscribed as above set forth were reduced to writing by myself in
presence of the witness- respectively and were subscribed by the
said witnesses respectively in my presence, and were con-
88 tinued from day to day as above set forth; that said deposi-
tions were taken at the time and place specified in the notice
hereto attached, and that I am not counsel, attorney, or relative of
either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and official seal this 24th day of February, A. D. 1885.

ALBERT STEPHAN,
Notary Public, Hamilton County, Ohio. [SEAL.]

Cost bill:

Writing and certifying deposition	13 00
Postage and expenses	42
Witness Wm. H. Hall	2 50
	15 92

Rec'd of T. M. Hinkle, attorney for plaintiffs, the sum of $13.42 in full of my fees as above specified.

The witnesses were paid their fees by Thornton M. Hinkle.

ALBERT STEPHAN,
Notary Public, Hamilton County, Ohio.

89 And I further certify that I have compared the foregoing copies of the depositions in said case with the original now on file in this office, and that they are true copies.

Witness my hand and the official seal of said court, at Portsmouth, this 14th day of July, 1885.

I. H SIMMONS, *Clerk.* [SEAL.]

90 And afterwards, to wit, on the 6th day of October, A. D. 1885, the following cost bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cost Bond.

In the Circuit Court of the United States for the Southern District of Ohio.

W. H. BROWN'- SONS }
vs. } # —.
J. S. CASEMENT & CO. }

I hereby acknowledge myself security for costs in this case.

J. H. BAUER. [SEAL.]

Taken and acknowledged before me this 3rd day of August, 1885.

ALBERT STEPHAN,
Notary Public, Ham. Co., Ohio.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, J. H. Bauer, a resident of said district, do solemnly swear that after paying my just debts and liabilities I am worth two thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

J. A. BAUER.

91 Sworn to and subscribed before me this 3rd day of August, A. D. 1885.

ALBERT STEPHAN,
[SEAL.] *Notary Public, Ham. Co., Ohio.*

And afterwards, to wit, on the 12th day of May, A. D. 1888, the following agreement was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Agreement Waiving Jury.

United States Circuit Court, Southern District of Ohio, Western Division.

W. H. BROWN'S SONS, Plaintiffs,
vs.
JOHN S. CASEMENT *et al.*, Defendants. } # 3804.

The above-named parties, plaintiffs and defendants, hereby waive trial by jury in the above cause and consent to submit the issues joined to the court for trial.

May 10, 1888.

THORNTON M. HINKLE,
Attorney for Plaintiffs.
W. A. HUTCHINS AND
J. W. BANNON,
Attorneys for Defendants.

92 And afterwards, to wit, on the 12th day of May, A. D. 1888, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

UNITED STATES OF AMERICA,
Southern Dist. of Ohio, Western Division. }

W. H. BROWN'S SONS
vs.
JOHN S. CASEMENT *et al.* } # 3804.

The defendants move the court to set aside its findings and grant a new trial, for the reasons following, viz:

1st. Said findings were not supported by the evidence.

2nd. Said findings were contrary to evidence.

3rd. Said findings were contrary to law.

4th. The construction given to the contract of Casement, Kelley & Co. with the railroad companies building the bridge was contrary to law.

5th. The findings and judgment should have been for the defendants.

W. A. HUTCHINS AND
J. W. BANNON,
Attorneys for Defendants.

93 And afterwards, to wit, on the 24th day of May, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 15.

This cause came on to be heard on the 12th day of May, 1888, before the circuit judge, and being submitted to the court upon the pleadings and proofs, the parties having duly waived a trial by jury, the court, on due consideration thereof, finds the issues joined for the plaintiffs, and that the value of the property lost to the plaintiffs on February 13, 1883, as alleged in the petition, was $7,954.02; that $215.85 was recovered, leaving due to plaintiffs $7,738.17, which sum, with interest from February 13, 1883, plaintiffs are entitled to recover from defendants herein.

And thereupon defendants give notice of a motion for a new trial.

And afterwards, to wit, on the 14th day of November, A. D. 1888, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, page 102.

94 Circuit Court of the United States, Southern District of Ohio, Western Division.

SAMUEL S. BROWN & HENRY BROWN, Partners as W. H. Brown & Sons, Plaintiffs,
vs.
JOHN S. CASEMENT, PHILIP KELLY, & JEREMIAH LE DUKE, Survivors of James C. McDonald, Partners as J. S. Casement & Co., Defendants.
} No. 3804.

Trial by jury having been waived by written agreement signed by counsel, on file, thereupon this cause was submitted to the court upon the issues joined by the pleadings and evidence heard in open court, and the court having been requested by the parties to make a special finding of the facts and state its conclusions of law and fact separately, such request is granted; and thereupon the court finds and states the conclusions of fact as follows, viz:

95 1. That early in the year 1882 the Pomeroy and Ohio River Railroad Company and the Point Pleasant and Ohio River Railroad Company, the former an Ohio corporation and the latter a West Virginia corporation, both duly organized, obtained proper authority from the States of Ohio and West Virginia and from the United States Government, under the acts of Congress relating to building bridges across the Ohio river, to construct and operate a railroad bridge across said Ohio river opposite the village of Point Pleasant, in West Virginia; that the plan of said bridge, the number, size, and location of the stone piers for the same were submitted to the proper officers of the United States Government and were duly approved, and said bridge and piers were located and constructed as authorized and directed by such officers.

There were six stone piers provided and built for the support of said bridge, one of which stood on top of the bluff bank of the river on the West Virginia side, another on top of the bluff bank on the Ohio side, and the other four between said banks of the river. Said four piers between the banks are known as "A," "B," "C," & "D." Said pier "A," being on the West Va. side of the river, was located and built at the outer edge of low-water mark; pier B, 250 feet west therefrom; pier "C," 250 feet west of pier B, and pier "D" at the edge of the water at low-water mark on the Ohio side, at the distance of 500 feet from said pier "C," the 96 west side of pier "A" and the east side of pier "D" reaching to the edge of the water at low-water mark. The long span between piers C & D was duly established as the channel span after notice duly given and consultation with those engaged in the navigation of the Ohio river, as required by law.

2. On the 27th day of January, 1882, the said The Pomeroy and Ohio River Railroad Company and the said The Point Pleasant and Ohio River Railroad Company entered into a written contract of that date with the said J. S. Casement & Co., the defendants in this suit, to furnish material and build said piers upon the terms and in the mode and manner stated in said agreement, a true copy of which is hereunto annexed, marked "A," and made part hereof, and is as follows, viz:

97 Memorandum of an agreement entered into this twenty-seventh day of January, A. D. 1882, between the Pomeroy and Ohio River Railroad Company and the Point Pleasant and Ohio River Railroad Company, of one part, and John S. Casement, James C. McDonald, Philip H. Kelly, Jeremiah Le Duke, a partnership firm doing business under the firm name of J. S. Casement & Co., in the State of Ohio, not incorporated, of the second part, witnesseth:

That for and in consideration of the payments and covenants hereinafter mentioned to be made and performed by the said parties of the first part the said parties of the second part hereby covenant and agree to construct and furnish in the most substantial and workmanlike manner, to the acceptance of the engineer in charge of the same, all the masonry necessary in the construction of six piers for the support of a bridge over and across the Ohio river at or near

Point Pleasant, in the State of West Virginia, and resting upon the Ohio shore of said river, as may be located and directed by the engineer of said parties of the first part; to furnish all material of every kind, name, and description necessary for the construction of the same, said material to be subject to the approval of said engineer and to be of such quality as may best insure the durability of said structure; to be at the expense of and subject to all expenses incident to and connected with said work of construction, the said work to be done and completed according to the plan and specifications
hereto annexed, marked "A," and subject to the inspection
98 and approval of the said engineer of said companies in charge
of said work, and which said plans and specifications are hereby expressly made a part of this contract.

It is further agreed between the said parties that said parties of the second part, in consideration of the payments to be made by said parties of the first part, covenant and agree to do all the work, furnish all material, and bear all the expense incident to and connected with the construction of the foundations for said piers so as aforesaid to be constructed; said foundations to be constructed under the direction and subject to the approval in every part and particular of the engineer of the said parties of the first part, including as well the mode and manner of the construction of said foundations as the material of all kinds used in the construction of said foundations.

It is further agreed that all bolts, clamps, drilling, and work necessary in the setting of the same shall be furnished by said parties of the second part and applied and fixed in place as may be directed by the engineer of said parties of the first part.

It is further agreed that said work shall be completed in every part on or before the first day of July, A. D. 1883, by said parties of the second part.

In consideration whereof the said parties of the first part covenant and agree to pay to said parties of the second part for the
masonry completed in the piers, as is set forth in said plans and
99 specifications hereto attached, the sum of fourteen dollars
and thirty cents per cubic yard; and it is further agreed between said parties that for all work done and material furnished by said parties of the second part in the construction of the foundation for said piers, as is hereinbefore set forth, the said parties of the first part agree to pay to said parties of the second part the actual cost of said work and materials and ten per cent. added to such cost aforesaid.

And it is further agreed for all clamps, bolts, and drillings, together with the cost of the labor necessary to fix the same in place in said piers, the said parties of the first part agree to pay to said parties of the second part the actual cost of said material and labor, with ten per cent. added thereto.

It is further agreed between said parties that the said parties of the first part *is* to furnish the right of way upon which said structures are to be erected, with sufficient space of ground for storing the material used in the construction of said work.

It is further agreed by the parties of the first part that estimates shall be made during the progress of the work on or about the first of each month, and that payments shall be made by said part*y* of the first part upon the estimate and certificate of the engineer in charge of said work, said payments to be made on or before the 15th day of each month, for the value of the work done and materials furnished during the previous month, ten per cent. being deducted
and retained by the company, until the final completion of
100 the work embraced in this contract, when all sums due the
part*y* of the first part shall be fully paid and this contract cancelled.

It is further agreed when said parties of the second part shall deliver stone and material upon the ground when said work is being done and prepared said parties of the first part agree to pay to the said parties of the second part the sum of seven dollars and fifty cents per cubic yard for all such stone as may be so delivered, the same to be paid upon the certificate of the engineer, as is provided hereinbefore for estimates on said work.

It is further agreed that all concrete used in the construction of said work shall be estimated and paid for at the same price (to wit, fourteen dollars and thirty cents) as masonry provided for in this contract.

In consideration whereof the said parties have hereunto set their hands this 27th day of January, A. D. 1882.

THE POMEROY & OHIO RIVER RAILROAD COMPANY,
By SAMUEL THOMAS, *President*. [SEAL.]
THE POINT PLEASANT & OHIO RIVER RAILROAD COMPANY,
By SAMUEL THOMAS, *President*. [SEAL.]

101 *Specifications "A."*

The masonry in the piers will be commenced at such depth and upon such foundations as may hereafter be decided upon by the engineer.

All stone used in the masonry must be entirely sound and of the best and most durable kind and quality, of the proper dimensions for the work, and subject to the approval of the engineer.

The masonry will be laid in regular horizontal courses, having parallel beds and vertical joints. The courses must not be less than eighteen (18) inches nor more than thirty (30) inches thick, decreasing in thickness uniformly from the bottom to the top of the walls.

Stretches to be not less than two and one-half ($2\frac{1}{2}$) feet nor more than six (6) feet long nor less in width than one and one-fourth ($1\frac{1}{4}$) times their depth. Headers must not be less than three and one-half ($3\frac{1}{2}$) feet nor more than six (6) feet long nor less in width than they are in depth of course. The beds and sides of the stone must be dressed before being placed in the work so as to form joints not exceeding five-eighths ($\frac{5}{8}$) of an inch in width.

The joints must be well broken and in no case less than twelve

(12) inches. Courses of stone will be continuous around and through the walls. Every stone must be laid in its natural bed and
102 have both beds well dressed, parallel and true to the proper line; the beds to be made always as large as the stone will admit of. The vertical joints of the face must be dressed not less than twelve (12) inches from the face and as much more as the stone will work. Particular care must be taken to have them well filled with mortar, and no joints to be laid more than five-eighths ($\frac{5}{8}$) nor less than three-eighths ($\frac{3}{8}$) of an inch in thickness.

All corners and batter lines to be run with a "chisel draft" of one and a half ($1\frac{1}{2}$) inches in width on each corner. Every second or third stone in each course must be a header. Headers must be properly arranged and constitute one-fourth ($\frac{1}{4}$) to one-third ($\frac{1}{3}$) of the dressed stone in the walls, and every header shall be immediately over a stretcher of the underlying course.

The whole of the masonry must be laid flush in good cement mortar, made on one measure of good hydraulic cement and two measures of clean sharp sand, well mixed together with water and used immediately after being mixed. The backing shall be of good sized, well-shaped stone of the same thickness as the face stones, with their beds dressed parallel and true to the proper line and arranged so as to break joints, thoroughly bonding the work in all directions, leaving no space between them over six (6) inches wide, and all spaces must be filled with small stones and spalls laid in cement and thoroughly grouted if required. Each course must be made impervious to water before the next course is laid, and no hammering on the walls will be allowed after the course is set. The face stone of the masonry will be "rock-dressed work," with
103 their front edges neatly pitched to a line corresponding with the finish line of the work, with no projections of more than three (3) inches from the proper line of the wall, except the cut work, as will be shown in detail drawings during the progress of the work, which is to be "bush-hammered." The bridge-seats and tops of piers will be finished with a coping course of such dimensions and projections as may be ordered by the engineer, neatly dressed and cut to a true surface on the top and edges in conformity with diagrams furnished by the engineer, and when laid must be well bedded and closely joined on all sides.

All the masonry must be neatly pointed with cement mortar. Finely tempered wrought-iron clamps will be used whenever required, and all necessary drilling and dressing must be carefully done, made to secure the iron-work, and to insure a close fit.

Concrete, when used, must be made by measure of four (4) parts of sound broken stone, of uniform size (that will pass through a two (2) inch ring), two parts of clean sharp sand, and one part of good hydraulic cement, all well mixed together before being put in place and well rammed in layers of about one (1) foot in thickness.

All material used in the work, including stone, cement, and sand, will be subject to the inspection and acceptance of the engineer, who will submit them to such tests as he may desire.

The work throughout will be executed in the most thorough,
104 substantial, and workmanlike manner, under the direction and supervision of the engineer of the company, who will give such directions from time to time during the construction of the work as may appear to him necessary and proper to make the work complete in all respects, as contemplated in the foregoing specifications. Said directions of the engineer will in all respects be complied with.

The engineer will also have full power to reject or condemn all work or materials which, in his opinion, do not conform to the spirit of the foregoing specifications, and shall decide every question that may arise between the parties relative to the execution of the work, and his decision in the nature of an award shall be final and conclusive on both parties to this contract.

Whenever the word engineer is used in the specifications and contract it is understood as applying to the chief engineer of the company, or, in his absence, his duly appointed assistant engineer or inspector representing him.

Contractors are expected to make the necessary examinations to satisfy themselves as to where the proper kind and quality of stone and other materials for the work can be obtained.

105 The defendants commenced and completed said piers under said written agreement and at the time of the injury complained of had completed the two piers on top of the bank and on each side of the river and partly constructed the other four piers between the banks.

3. For about two weeks prior to the injury complained of the Ohio river had been rising rapidly, and on the morning of the injury (or shortly before that) had attained its highest stage, and higher at that point than it had ever before been known, and was known as the great flood of Feb., 1883. Business for about ten days had been partially suspended on account of the high stage of the water; but one tow had gone down the river three days before accident.

The village of Point Pleasant, on the West Va. side, is mostly on high ground that was not under water; but on the Ohio side the bank was under water, which extended " inland for at least a quarter of a mile or more."

4. At the time of the accident piers A, B, & C ranged from eight to eighteen feet above low-water mark and were covered with water to a depth ranging from thirty-seven to forty-seven feet, while channel pier D, on the Ohio side, had been built to the height of forty-eight feet above low-water mark and was then covered with water to the depth of about seven feet, the stage of water in
106 the river being about fifty-five feet above low-water mark.

The piers on top of the banks, one on each side, had both been completed and stood out of water to the height of about twenty-four or twenty-five feet, the one on the Ohio side standing about fifty feet back from the bluff bank and about one hundred feet from channel pier D, on a line level with the cord of the bridge.

5. There is a very slight curve in the river at Point Pleasant, the Ohio shore being on the convex side, and at high stages of water it is customary and proper for coal fleets to "run the points," running *as* near the shore on the Ohio side at a distance of a quarter of a mile and more above the bridge in descending the river and bearing out to the left of channel pier D and between channel pier D & C and running in near the shore on the West Va. side about two miles below said village of Point Pleasant, and the channel of the river was between said channel piers C & D, and the usual and proper course was to run between said piers C & D, running the points as before stated.

6. The night before the accident the plaintiffs' three steamboats—the "Resolute," the "Alarm," and the "Dexter"—with coal barges in tow, tied to shore during the night some distance above the bridge.

The "Resolute," with its tow, was in advance of the other two, passing the bridge on the morning of the accident between eight and nine o'clock. The "Alarm," with its tow, reached the bridge
about 10 o'clock in the morning. Its tow consisted of six
107 coal barges, three abreast, each barge being twenty-six feet
wide and drawing between seven and eight feet of water.
The front middle barge ran upon and struck said channel pier D, which caused the injury complained of.

The steamer "Dexter," with its tow, passed shortly after between said channel piers C & D, where the Resolute, with its tow, had previously passed, and while one of the Alarm's barges that struck said pier D was still lying on said pier in plain view.

7. The morning of the accident was clear and calm, and the Alarm, with its tow, was steaming and handling well. The pilot in charge was well acquainted with the Ohio river at that point and from Pittsburg to all points below, and while the work of constructing said pier was going on, had passed there twice a week and saw and knew where said piers were located and to what extent the work had progressed and where the channel span had been established and its length, and also knew that prior to the location of said bridge the usual channel for coal fleets in passing down the river was further to the left, between piers B & C and near to said pier B.

8. As the Alarm approached the bridge no halt was made nor was any one sent forward in a skiff or otherwise to take observations or make inquiry. The pier standing on the Ohio bank, twenty-four feet out of water, was in plain view and was seen by
said pilot and others in the pilot-house, and the same
108 was the case as to the pier on the east bank of the river.

The village of Point Pleasant and its buildings, well known to pilots and other rivermen, were also in plain view.

There *was* also on the Ohio side, between the top of the bank, both above and below the bridge, growing trees, the tops of which were some distance out of water, that *was* in plain view and were noticed by said pilot, but for the distance of about a quarter of a mile immediately above and below said bridge the line of trees did not extend. At the time of the accident there were present in the pilot-house, aiding and assisting the pilot in charge, the other pilot of the Alarm and three other pilots, who were on the lookout, making observations and consulting as to the passage of the bridge, none of whom saw any buoys or break to indicate where the pier was. Another man acted as lookout, was on the extreme front of the tow, and he saw no buoys or break to indicate the location of said pier D.

9. During the building of said four piers between the banks of the river proper buoys had been kept upon the same, to which during the night proper lights had been attached as signals to warn passing boats and other water craft of danger; but for some days prior to the accident, on account of the height of the water and the large quantity of floating drift, the buoys had been carried off and floated down the river, but had been secured and replaced till the night preceding the accident or the night previous to that, when the
buoy on pier D had again been washed off and had not
109 been replaced at the time of the accident, and the fact of its
absence was known to defendants early in the morning of the accident, and they made no effort to restore it till after the accident, and that they might have done so; neither did they send any one up the river or adopt any other plan, as they might have done, to notify approaching boats of the absence of said buoy, or adopt any other plan.

10. The said railroad companies provided, employed, and paid for the services of a chief and an assistant engineer to superintend said work, one of whom was at all times on the ground and gave directions as to the mode and manner of constructing said stone piers and decided as to the quantity of stone, the height and size and shape of the piers, and performed all the duties specified in said written contract. Said railroad companies, through said engineers as their agents, duly authorized, took charge of, directed, and controlled as to providing buoys and lights to be kept upon said piers, the character of the same and the mode and manner of fastening them to said piers and keeping them in place. Said engineers of said railroad company, however, on behalf of said railroad company, employed the defendants to furnish the materials and perform the work in preparing said buoys and lights and in putting them up and in keeping them in place when and as directed by said engineers. The defendants were paid for said materials and work, an account of which was kept by defendants and was carried into their monthly bills with the stone-work, and was settled and paid for with the other work.

110 Prior to said accident said engineers had given to the defendants such directions as to the character of such buoys to be used and as to the mode and manner of putting them and keeping them up, and it was the duty of defendants to see that they were kept up and replaced when washed away under said instructions

previously given and without waiting for future instructions, and which they had undertaken to do.

11. No break at the time of the accident over pier D was seen by the pilot of the Alarm nor by those assisting him nor by the lookout in the front, nor did he see any break over channel pier C, nor did those assisting him at the time see any break over said pier D, while one of them saw a break or swirl on the water at about the location of said channel pier C.

12. The plaintiffs were partners and owned the coal and barges which were lost by said accident as alleged in *its* petition, and the damages sustained by them, including interest to Oct. 2, 1888, the first day of this term, on account of the wrong complained of amount to the sum of ten thousand three hundred fifty-four $\frac{98}{100}$ dollars.

And as conclusions of law from the facts thus found, and not otherwise, the court finds:

1. That the defendants, by the terms of said written agreement made with said railroad companies, are independent contractors and are liable to the plaintiffs for the injury complained of.

111 2. That the agreement made by defendants with said railroad companies to furnish the material and do the work in preparing, putting up, and keeping up said buoys and lights on said piers created the relation of independent contractors and made the defendants liable to the plaintiffs for the injury complained of.

3. That it was the duty of defendants to have kept a buoy upon said pier D and if washed off by drift or otherwise to have replaced it, or, if this could not have been done, on the morning of the accident before the injury they could and should have sent some one up the river a sufficient distance above the bridge or adopted some other plan to notify approaching boats of the loss of such buoy and of the location of the piers, and their failure to do so constitutes negligence on their part and under such circumstances those in charge of plaintiffs' coal boats and barges were not chargeable with negligence in failing to make accurate calculations as to the location of said pier D from the other objects in view and seen by them or that they might have seen.

4. That the plaintiffs and their agents in charge of the tow were at the time in the exercise of reasonable and proper care in the management and navigation of the tow and were not guilty of contributory negligence; that at the time of the accident the plaintiffs' boat Alarm, with its coal tow, was in the usual and proper place of navigation at that stage of water.

112 5. That the plaintiffs by reason of *its* premises are entitled to recover from the defendants their said damages, amounting, with interest, to the said sum of $10,354.98.

To which findings of the court as conclusions of law the defendants excepted and thereupon filed their motion asking the court to set aside its finding and grant a new trial for the reasons stated in said motion; which motion was overruled by the court; to which ruling the defendants also excepted.

It is therefore considered that the plaintiffs recover of the defendants said sum of $10,354.98, the amount of their damages and interest as aforesaid, and also their costs, taxed to — dollars and — cents.

The defendants give notice of their intention to appeal to the Supreme Court of the United States by prosecuting a writ of error to reverse said judgment, and at their request the court now fixes the amount of the appeal bond to the sum of $21,000, with surety to the acceptance of the clerk of this court, conditioned according to law.

November 14, 1888.

HOWELL E. JACKSON,
Circuit Judge.

113 And afterwards, to wit, on the 12 day of December, A. D. 1888, the following supersedeas bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Supersedeas Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

W. H. BROWN'S SONS
vs.
JOHN S. CASEMENT and Others.
} # 3804.

Know all men by these presents that we, John S. Casement and Samuel K. Gray, of Painesville, Lake county, Ohio, and Mary L. Casement, of Painesville, Lake county, Ohio, are held and firmly bound unto the above-named W. H. Brown's Sons, plaintiffs in the above cause, in the sum of twenty-two thousand dollars, to be paid to the said W. H. Brown's Sons, their survivors, executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

114 Sealed with our seals. Dated this 6th day of December, 1888.

Whereas the above-named John S. Casement and others, defendants in the above cause, have duly given notice and propose to prosecute a petition in error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio, western division:

Now, therefore, the condition of this obligation is such that if the above-named John S. Casement and others, defendants, shall prosecute said writ of error to effect and answer all judgments, damages, and costs if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

JOHN S. CASEMENT. [SEAL.]
SAMUEL K. GRAY. [SEAL.]
MARY L. CASEMENT. [SEAL.]

Sealed and delivered in presence of—
FRANK J. JEROME.
WM. LOCKWOOD.

The above security is approved.

GEO. R. SAGE,
District Judge of the United States, S. D. O.

115 NORTHERN DISTRICT OF OHIO, *ss:*

I, Samuel K. Gray, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth fifteen thousand dollars in real estate in my own name, situate in the county of Cuyahoga, in said district.

SAMUEL K. GRAY.

Sworn to before me the 6th day of December, 1888.

FRANK J. JEROME,
Notary Public, Lake County, Ohio. [SEAL.]

NORTHERN DISTRICT OF OHIO, *ss:*

I, Mary L. Casement, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth twenty-five thousand dollars in real estate in my own name, situate in the county of Lake, in said district.

MARY L. CASEMENT.

Sworn to before me the 6th day of December, 1888.

FRANK J. JEROME,
Notary Public, Lake County, Ohio. [SEAL.]

116 UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a complete and true transcript of the proceedings had by and before said court in the above-entitled cause, as the same appears of record and on file in the clerk's office of said court.

Seal of the Circuit Court,
Southern Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 29th day of January, A. D. 1889.

B. R. COWEN, *Clerk,*
By R. C. GEORGI, *Deputy.*

117 THE UNITED STATES OF AMERICA, *ss:*

To Samuel S. Brown and Harry Brown, partners as W. H. Brown'-Sons, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Jno. S. Casement, Philip H. Kelley, and Jerre Le Duke, survivors of James C. McDonald, late partners as J. S. Casement & Co., are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 19th day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

GEORGE R. SAGE,
U. S. District Judge within and for the Southern District of Ohio, Sitting and Holding Circuit Court, there being no Circuit Judge or Associate Justice in the District.

118 [Endorsed:] 135. 1, 19, '88. United States circuit court, S. D. O., W. D.. No. 3804. W. H. Brown'- Sons *vs.* J. S. Casement & Co. Citation to defendant in error. Filed Jan'y 23, 1889. B. R. Cowen, clerk.

Received this writ, at Cincinnati, Ohio, on the 19th day of January, 1889, and at said Cincinnati, Ohio, on the 21st day of January, 1889, I served the within-named Samuel S. Brown and Harry Brown, partners as W. H. Brown'- Sons, with true copies of this writ, having all the endorsements thereon, delivered to Thornton M. Hinkle, attorney of record for said defendants in error.

H. C. URNER, *U. S. Marshal,*
By RICHARD C. ROHNER, *Deputy.*

2 services	$4 00
2 copies	1 00
1 mile	06
	$5 06

119 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Samuel S. Brown and Harry Brown, partners as W. H.

Brown'- Sons, and J. S. Casement & Co., a manifest error hath happened, to the great damage of the said J. S. Casement & Co., as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court,
South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 19 day of January, 1889, in the year of our Lord one thousand eight hundred and eighty-nine.

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

120 [Endorsed:] United States circuit court, S. D. O., W. D. No. 3804. W. H. Brown'- Sons *vs.* J. S. Casement & Co. Writ of error. Filed Jan'y 19th, 1889. B. R. Cowen, clerk.

121 UNITED STATES OF AMERICA:

Supreme Court.

JOHN S. CASEMENT, PHILIP H. KELLEY, and Jerry Le Duke, Survivors of James C. McDonald, Deceased, Late Partners under the Firm Name of J. S. Casement & Co., Plaintiffs in Error,

vs.

SAMUEL S. BROWN and HARRY BROWN, Partners as W. H. Brown'- Sons, Defendants in Error.

In Error to Circuit Court of United States, 6th Circuit, Southern District of Ohio, Western Division.

The above-named plaintiffs in error complain of the above-named defendants in error and say that at the October term, 1888, of the United States circuit court for the southern district of Ohio, western division, in a certain action pending in said court, wherein the said above-named defendants in error were plaintiffs and the said above-named plaintiffs in error were defendants, by the consideration of said court the said defendants in error recovered judgment against said plaintiffs in error for the sum of $10,354.98, damages and interest, and $——, costs of suit. Said cause was numbered 3804 and a duly certified transcript of the record and proceedings in which is hereto annexed, marked "A," and made part hereof.

Said plaintiffs in error say there is error to their prejudice
122 in said record and proceedings in this, to wit:

1st. Said court erred in finding and holding as conclusion of law from the facts specially found that by the terms of said written agreement entered into by and between plaintiffs in error and said railroad companies that plaintiffs in error stood in the relation of independent contractors and were liable for the injury complained of.

2d. Said court erred in finding as conclusion of law from the facts specially found that the agreement verbally made by plaintiffs in error with said railroad companies to furnish the material and do the work in preparing, putting up, and keeping up said buoys and lights on said piers created the relation of independent contractors and rendered the plaintiffs in error liable for the injury complained of.

3d. Said court erred in finding as conclusion of law from the facts specially found that it was the duty of plaintiffs in error to have kept a buoy on said pier D, and if washed off, by drift or otherwise, to have replaced it, or, if this could not have been done, on the morning of the injury they could and should have sent some one up the river a sufficient distance above the bridge or adopted
123 some other plan to notify approaching boats of the loss of such buoy and of the location of the piers, and their failure to do so constitutes negligence on their part, and under such circumstances those in charge of the coal boats and barges of defendants in error were not charg-able with negligence in failing to make accurate calculations as to the location of said pier D from the other objects in view and seen by them or that they might have seen.

4th. That defendants in error and their agents in charge of the tow were at the time in the exercise of reasonable and proper care in the management and navigation of the tow and were not guilty of contributory negligence, and that at the time of the accident the boat Alarm of defendants in error, with its coal and tow, was in the usual and proper place of navigation at that stage of water.

5th. Said court erred generally in its first, second, third, and fourth findings of conclusions of law from the special findings of facts.

6th. Said court erred in holding as conclusion of law from the facts found that defendants in error (plaintiffs below) were entitled to recover judgment.

124 7th. Upon the pleadings and facts found by the court judgment should have been rendered in favor of plaintiffs in error instead of defendants in error.

Plaintiffs in error therefore ask that said judgment be reversed; that judgment be rendered by this court in their favor, and that they be restored to all they have lost by reason of such erroneous judgment.

W. A. HUTCHINS AND
J. W. BANNON,
Att'ys for Pl'ffs in Error.

[Endorsed:] # 6145. William H. Brown's Sons *vs.* John S. Casement and others. Transcript from U. S. circuit court, S. D. O.

Endorsed on cover: S. Ohio C. C. U. S. No. 1353. J. S. Casement & Co., plaintiffs in error, *vs.* Samuel S. Brown and Harry Brown, partners as W. H. Brown's Sons. Filed October 14, 1889.

148 U.S. 615

Office Supreme Court U. S.
FILED.
MAR 6 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 173.

J. S. CASEMENT AND COMPANY, PLAINTIFFS IN ERROR,

vs.

SAMUEL S. BROWN AND HARRY BROWN, PARTNERS
AS W. H. BROWN'S SONS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR PLAINTIFFS IN ERROR.

W. A. HUTCHINS AND
J. W. BANNON,
Attorneys for Plaintiffs in Error.

THORNTON M. HINKLE,
Attorney for Defendants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1892.

No. 173.

J. S. CASEMENT AND COMPANY, PLAINTIFFS IN ERROR,

vs.

SAMUEL S. BROWN AND HARRY BROWN, PARTNERS
AS W. H. BROWN'S SONS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

On March 29th, 1884, plaintiffs below, Samuel S. Brown and Harry Brown, partners as W. H. Brown's Sons, filed their petition in the Court of Common Pleas, of Scioto County, Ohio, against John S. Casement, Philip H. Kelly and Jerry Le Duke, survivors of James C. McDonald, deceased, late partners as J. S. Casement & Co., defendants.

SUBSTANCE OF THE PETITION.

The petition, so filed, was to the effect, that on January 1st, 1883, and prior thereto, plaintiffs had been partners, engaged in the business of mining coal and transporting the same in boats and barges on the Ohio river, which is a navigable river and a common and public highway for the use of all persons at their free will and pleasure. That on February 13th, 1883, they owned three barges containing 70,922 bushels of coal and some other articles of personal property, in all, of the value of $7,954.02, which barges were being towed by plaintiff's steamer "Alarm" down the Ohio river past the town of Point Pleasant, West Virginia. That defendants were then engaged in constructing a bridge across said river from said town of Point Pleasant to a point in Gallia County, Ohio, and had partially erected at various points in the channel of said river four stone piers on which to support said bridge; thereby said river and the free use and navigation thereof as aforesaid were obstructed and rendered unsafe and dangerous.

That on said date said piers were beneath the surface of the water and wholly concealed by the same, and were carelessly and negligently left by defendants without any buoys or light or other means to mark their location and to warn those navigating said river thereof. Thereby, without the fault of plaintiffs, said steamer Alarm and barges struck upon the western one of said piers and said barges were sunk and with their contents were totally destroyed and lost, to plaintiffs damage in the sum of $7,954.02, for which, with interest from Feb. 13, 1883, and for costs and other proper relief, they asked judgment. (See printed Record, pages 1 and 2.)

SUBSTANCE OF THE ANSWER.

To this petition an answer was filed by defendants below to this effect, viz: That as to the averments relating to the sinking of said barges loaded with coal, as to the ownership and value of the same, and as to the amount of damages sustained, for the want of knowledge upon the subject, the same were denied.

It was admitted that the said defendants, J. S. Casement & Co., as contractors with the Pomeroy and Ohio River Railroad Company, and the Point Pleasant and Ohio River Railroad Company, built certain piers in the Ohio river for a bridge for said railroad companies across said river from said town of Point Pleasant, in West Virginia, to a point opposite, in Gallia County, Ohio; but it was avered that with respect to the places where said piers were located, and as to the time and manner of doing the work, they at all times were required to act and did act under the immediate supervision, direction and control of the engineer of said railroad companies in charge of said work.

They averred that the building of said bridge, as the same was constructed, was duly authorized by law. That said piers were built at the points designated by said engineer, who also acted under the direction of the duly authorized engineers and officers of the United States Government. They denied that the erection of said piers obstructed the free use and navigation of said river or rendered the same unsafe or dangerous. They denied that said piers were so concealed by water, or otherwise, as to prevent their location from being plainly marked and well known; and they further denied that said piers had been either carelessly or negligently left by them without buoys or lights to mark their location, but on the contrary, it was averred that the locations of all of said piers were plainly visible and well known to all persons navigating said river, and especially to the plaintiffs. They also averred that if it was true that plaintiff's boat and barges at the time stated struck upon said pier, it was by reason of the negligence and carelessness of the plaintiffs, their officers and servants in charge of the same; that said pier was not in the channel of the river, or at a point where said boat and barges should have been run in navigating said river;

and the plaintiffs, their officers and servants, in so running the same were guilty of great carelessness and negligence, contributing directly to the injury complained of, and were not entitled to recover said damages, or any amount whatever. (See printed Record, pages 6 and 7).

SUBSTANCE OF THE REPLY.

To this answer a reply was filed, to the effect that in respect to any direction or control exercised over defendants by the engineer of said railroad companies, as to the places where said piers were located, and as to the manner of doing said work, they had no knowledge, and, therefore, could not admit, but did deny said averments. And they further averred that even if it were true that defendants were so under the direction and control of the engineer of said railroad companies, they denied that by reason thereof, defendants were relieved of responsibility for losses or damages resulting from their carelessness and negligence in the construction of said piers, and in failing to notify plaintiffs of the dangerous condition thereof. They also denied that it was true that plaintiffs and those in their employ, in running said steamboat and said fleet of boats in tow, were guilty of any carelessness or want of skill in passing said piers which contributed to said loss and damage, or that anything else than the carelessness of defendants in erecting said piers and leaving them without providing the necessary guard or warning to plaintiffs and their employes in passing the same caused the loss and damage complained of. (See printed record, page 7.)

After the cause was thus at issue in the State Court, and after certain depositions had been taken, viz: On the 14th day of May, 1885, plaintiffs below obtained an order to remove the cause to the U. S. Circuit Court on the ground that plaintiffs were citizens of different states, and that from local prejudice they would not be able to obtain justice in the State Court. (Printed record, pages 8, 9 and 10.)

On the 6th day of October, 1885, plaintiffs below filed in the Circuit Court a transcript of the proceedings in the State Court which embraced copies of the proceedings before referred to, and also copies of such *depositions* as had *then* been taken by the plaintiffs. The depositions by mistake, or inadvertence, have been copied into the printed record, and extend from page 10 to page 43. They constitute only *part* of the evidence, both oral and written, upon which the case was heard, and as this proceeding in error rests upon special findings of both fact and law, we suppose none of the *evidence* should have been incorporated into the record. But it can do no harm.

WAIVER OF TRIAL BY JURY.

On the 12th day of May, 1888, the cause was called for trial in the Circuit Court, whereupon a written waiver of trial by jury was properly signed by counsel and entered upon the journal. (Record, page 43.)

SPECIAL FINDINGS OF FACT AND LAW.

Trial by jury having been thus waived, the cause was submitted to the Court upon the issues joined by the pleadings and evidence heard in open court; and the Court having been requested by the parties to make a special finding of the facts and state its conclusions of law and fact separately, such request was granted; and thereupon the Court found and stated the conclusions of fact and law as set out in the printed record, pages 44, 53, which findings (except 2d, which is a copy of agreement) for convenience are here copied, and are as follows, viz :

"Trial by jury having been waived by written agreement signed by counsel, on file, thereupon this cause was submitted to the court upon the issues joined by the pleadings and evidence heard in open court, and the court having been requested by the parties to make a special finding of the facts and state its conclusions of law and fact separately, such request is granted; and thereupon the court finds and states the conclusions of fact as follows, viz:

"1. That early in the year 1882 the Pomeroy and Ohio River Railroad Company and the Point Pleasant and Ohio River Railroad Company, the former an Ohio corporation and the latter a West Virginia corporation, both duly organized, obtained proper authority from the States of Ohio and West Virginia and from the United States Government, under the acts of Congress relating to building bridges across the Ohio river, to construct and operate a railroad bridge across said Ohio river opposite the village of Point Pleasant, in West Virginia; that the plan of said bridge, the number, size, and location of the stone piers for the same were submitted to the proper officers of the United States Government and were duly approved, and said bridge and piers were located and constructed as authorized and directed by such officers.

"There were six stone piers provided and built for the support of said bridge, one of which stood on top of the bluff bank of the river on the West Virginia side, another on top of the bluff bank on the Ohio side, and the other four between said banks of the river. Said four piers between the banks are known as "A," "B," "C" & "D." Said pier "A" being on the West Va. side of the river, was located and built at the outer edge of low-water mark; pier "B," 250 feet west therefrom; pier "C," 250 feet west of pier "B," and pier "D" at the edge of the water at low-water mark on the Ohio side, at the distance of 500 feet from said pier "C," the west side of pier "A" and the east side of pier "D" reaching to the edge of the water at low-water mark. The long span between piers "C" & "D" was duly established as the channel span after notice duly given and consultation with those engaged in the navigation of the Ohio river, as required by law.

"2. On the 27th day of January, 1882, the said The Pomeroy and Ohio River Railroad Company and the said The Point Pleasant and Ohio River Railroad Company entered into a written contract of that date with the said J. S. Casement & Co., the defendants in this suit, to furnish material and build said piers upon the terms and in the mode and manner stated in said agreement, a true copy of which is hereunto annexed, marked "A," and made part hereof, and is as follows, viz:

(AGREEMENT OMMITTED.)

"The defendants commenced and completed said piers under said written agreement and at the time of the injury complained of had completed the two piers on top of the bank and one on each side of the river and partly constructed the other four piers between the banks.

"3. For about two weeks prior to the injury complained of the Ohio river had been rising rapidly, and on the morning of the injury (or shortly before that) had attained its highest stage, and higher at that point than it had ever before been known, and was known as the great flood of February, 1883. Business for about ten days had been partially suspended on account of the high stage of the water; but one tow had gone down the river three days before accident.

"The village of Point Pleasant, on the West Virginia side, is mostly on high ground that was not under water; but on the Ohio side the bank was under water, which extended 'inland for at least a quarter of a mile or more.'

"4. At the time of the accident piers A, B & C ranged from eight to eighteen feet above low-water mark and were covered with water to a depth ranging from thirty-seven to forty-seven feet, while channel pier D, on the Ohio side, had been built to the height of forty-eight feet above low-water mark and was then covered with water to the depth of about seven feet, the stage of water in the river being about fifty-five feet above low-water mark. The piers on top of the banks, one on each side, had both been completed and stood out of water to the height of about twenty-four or twenty-five feet, the one on the Ohio side standing about fifty feet back from the bluff bank and about one hundred feet from channel pier D, on a line level with the cord of the bridge.

"5. There is a very slight curve in the river at Point Pleasant, the Ohio shore being on the convex side, and at high stages of water it is customary and proper for coal fleets to "run the points," running near the shore on the Ohio side at a distance of a quarter of a mile and more above the bridge in descending the river and bearing out to the left of channel pier D and between channel piers D & C and running in near the shore on the West Virginia side about two miles below said village of Point Pleasant, and the channel of the river was between said channel piers C & D, and the usual and proper course was to run between said piers C & D, running the points as before stated.

and as directed by said engineers. The defendants were paid for said materials and work, an account of which was kept by defendants and was carried into their monthly bills with the stone-work, and was settled and paid for with the other work.

"Prior to said accident said engineers had given to the defendants such directions as to the character of such buoys to be used and as to the manner and mode of putting them and keeping them up, and it was the duty of defendents to see that they were kept up and replaced when washed away under said instructions previously given and without waiting for future instructions, and which they had undertaken to do.

" 11. No break at the time of the accident over pier D was seen by the pilot of the Alarm nor by those assisting him nor by the lookout in the front, nor did he see any break over channel pier C, nor did those assisting him at the time see any break over said pier D, while one of them saw a break or swirl on the water at about the location of said channel pier C.

" 12. The plaintiffs were partners and owned the coal and barges which were lost by said accident as alleged in their petition, and the damages sustained by them, including interest to Oct. 2, 1888, the first day of this term, on account of the wrong complained of amount to the sum of ten thousand three hundred fifty four 98-100 dollars.

" And as conclusion of law from the facts thus found, and not otherwise, the court finds:

" 1. That the defendants, by the terms of said written agreement made with said railroad companies, are independent contractors and are liable to the plaintiffs for the injury complained of.

" 2. That the agreement made by defendants with said railroad companies to furnish the material and do the work in preparing, putting up, and keeping up said buoys and lights on said piers created the relation of independent contractors and made the defendants liable to the plaintiffs for the injury complained of.

"3. That it was the duty of defendants to have kept a buoy upon said pier D and if washed off by drift or otherwise to have replaced it, or, if this could not have been done, on the morning of the accident before the injury they could and should have sent some one up the river a sufficient distance above the bridge or adopted some other plan to notify approaching boats of the loss of such buoy and of the location of the piers, and their failure to do so constitutes negligence on their part and under such circumstances those in charge of plaintiff's coal boats were not chargeable with negligence in failing to make accurate calculations as to the location of said pier D from the other objects in view and seen by them or that they might have seen.

"4. That the plaintiffs and their agents in charge of the tow were at the time in the exercise of reasonable and proper care in the management and navigation of the tow and were not guilty of contributory negligence; that at the time of the accident the plaintiffs' boat Alarm, with its coal tow, was in the usual and proper place of navigation at that stage of water.

"5. That the plaintiffs by reason of the premises are entitled to recover from the defendants their said damages, amounting, with interest, to the said sum of $10,354.98.

"To which findings of the Court as conclusions of law the defendants excepted and thereupon filed their motion asking the Court to set aside its finding and grant a new trial for the reasons stated in said motion; which motion was overruled by the Court; to which ruling the defendants also excepted.

"It is therefore considered that the plaintiffs recover of the defendants said sum of $10,354.98 the amount of their damages and interests as aforesaid, and also their costs, taxed to — dollars and — cents.

"The defendants give notice of their intention to appeal to the Supreme Court of the United States by prosecuting a writ of error to reverse said judgment, and at their request the court now fixes the amount of the appeal bond to the sum of $21,000 with surety to the acceptance of the clerk of this court, conditioned according to law."

MOTION FOR A NEW TRIAL.

Such findings of fact and law being in favor of the plaintiffs below, thereupon the defendants filed their motion asking the court to set aside its findings and grant a new trial for the following reasons, viz:

1st. Said findings were not supported by the evidence.

2d. Said findings were contrary to the evidence.

3d. Said findings were contrary to law.

4th. The construction given to the contract of Casement, Kelley & Co. with the railroad companies building the bridge was contrary to law.

5th. The findings and judgment should have been for the defendants. (See Record, pages 43 and 44.)

Said motion for a new trial having been overruled, judgment was entered on said findings in favor of the plaintiffs below for said damages and interest, amounting to the sum of $10,354.98, and costs of suit. (Record, pages. 52 and 53.)

ASSIGNMENT OF ERRORS.

And thereupon this writ of error is prosecuted, the assignments of error being as follows, viz:

1st. Said court erred in finding and holding as conclusion of law from the facts specially found, that by the terms of said written agreement entered into by and between plaintiffs in error and said railroad companies that plaintiffs in error stood in the relation of independent contractors and were liable for the injury complained of.

2d. Said court erred in finding as conclusion of law from the facts specially found, that the agreement verbally made by plaintiffs in error with said railroad companies to furnish the material and do the work in preparing, putting up, and keeping up said buoys and said lights on said piers created the relation of independent contractors and rendered the plaintiff in error liable for the injury complained of.

3d. Said Court erred in finding as conclusion of law from the facts specially found, that it was the duty of plaintiffs in error to have kept a buoy on said pier D, and if washed off, by drift or otherwise, to have replaced it, or, if this could not have been done, on the morning of the injury, they could and should have sent some one up the river a sufficient distance above the bridge or adopted some other plan to notify approaching boats of the loss of the buoy and of the location of the piers, and their failure to do so constitutes negligence on their part; and under such circumstances those in charge of the coal fleets and barges of defendants in error were not chargeable with negligence in failing to make accurate calculations as to the location of said pier D, from the other objects in view and as seen by them, or that they might have seen.

4th. That defendants in error and their agents in charge of the tow were at the time in the exercise of reasonable and proper care in the management and navigation of the tow and were not guilty of contributory negligence; and that at the time of the accident the boat Alarm of defendants in error, with its coal and tow was in the usual and proper place of navigation at that stage of water.

5th. Said court erred generally in its first, second, third and fourth findings of facts.

6th. Said court erred in holding as conclusion of law from the facts found that defendants in error were entitled to recover judgment.

7th. Upon the pleadings and facts found by the court, judgment should have been in favor of plaintiffs in error, instead of being in favor of defendants in error. (Record, pages 56, 57.

ARGUMENT.

Only two general questions are presented for argument, one relating to *negligence*, the other as to the *relation* sustained between the owners of the bridge and the contractors doing the work.

I.

If the injury complained of was the result of negligence, whose negligence was it; was it that of defendants or plaintiffs, or of the contributory negligence of both? These points can best be considered together.

It will be observed that the only negligence of defendants below complained of, and upon which the judgment of the lower court was based, was of a negative character. It was not something done but something not done. It consisted in the fact that at the time of the accident there was no *buoy* afloat over pier D, nor was anyone sent up the river, or any other plan adopted to notify approaching boats of the loss of such buoy and of the location of the pier. (See finding of facts 9, and of law 3, as herein copied from Record, pages 51 and 52.)

Let it then be kept in mind that the charge of negligence against defendants below is alone based on the failure to give notice of the location of pier D by a buoy fastened to the same, or in some other manner.

Looking now to negligence as it relates alone to the defendants below, we claim as a question of law, that no such precaution was required of them. At the time of the accident they were not called upon to have a floating buoy over pier D, nor in any other manner give notice of the *location* of the same, because:

Said pier D was outside of the channel of the river, not in a place where it was customary or usual for boats to run, or where there was any necessity for their being run.

This pier D stood on the west side of the river, called the Ohio side, at the outer edge of low water mark, 500 feet distant from C, the next pier east. This long span was duly established as the channel span. The other two spans going east were from C to B, 250 feet, and from B to A, 250 feet; said pier A being outside of low water mark on the east side of the river, called the West Virginia side; the distance across the river from low water mark being 1,000 feet. (See facts 1, Record, 45). See also *map* showing location of piers, hereto annexed.

"Prior to the location of said bridge the usual channel for coal fleets in passing down the river was further to the left, between piers B & C, and near said pier B." (Facts 7, Record, 50).

"At high stages of water it was customary and proper for coal fleets to 'run the points,' running near the shore on the Ohio side at the distance of a quarter of a mile and more above the bridge in descending the river and bearing out to the left of channel pier D and between channel piers D and C, and running in near the shore on the West Virginia side about two miles below said village of Point Pleasant, and the channel of the river was between said channel piers C & D, and the usual and proper course was to run between said piers C & D, running the points as before stated." (Facts 5, Record 50.)

It thus appears that pier D was not in the channel of the river, nor where it was "customary" or "usual and proper" for boats to run. It stood on dry land on the sloping bank in low water, its inner edge merely reaching to the water. From there to pier C was an open space of 500 feet which constituted the channel of the river.

Upon this point the following authorities are applicable:

"Where a flat boat, which was tied to the bank of the Mississippi river at night, was run down and sunk by a steamer, the circumstances show that the steamer was in fault, and must be responsible for the loss."

"It was not necessary for the flat-boat, in the position which it occupied, to show a light during the night."

"When a boat or vessel of any kind is fastened for the night at a landing place to which other boats may have occasion to make a landing in the night, it is certainly prudent for her position to be designated by a light, on her own account, as well as that the vessel making the landing may have light to do so. But where a vessel is tied to the bank of a river, not in a port or harbor, or at a place of landing, out of the line of customary navigation, there is no occasion for her to show a light, nor has it ever been required that she should do so." *James H. Ure, claimant of the steamer Gipsey, Appellant, vs. James M. Coffman and Cyrus Coffman, owners of flat-boat and cargo.* 19 *How, U. S. reports*, 56.

See language of *Justice Wayne* in the above case, pages 62 and 63.

It will be noticed that while this case was in admiralty where the damages could have been divided in case both parties were in fault, yet the finding is that the failure to have a light on the flat boat was not negligence, but the whole fault was with the steamboat in being "out of the line of customary navigation," and, hence, there was a recovery for full damages, and this court sustained the judgment.

In another admiralty case it was held by this court that: "Neither rain nor snow, the darkness of the night nor the absence of a light from a barge or sailing vessel, nor the fact that the steamer was well manned and furnished, and conducted with caution, will excuse a steamer from coming in collision with a barge or sailing vessel, when the barge or sailing vessel is at anchor or sailing a thoroughfare, but out of the usual track of the steam vessel.

"Therefore, where a collision took place between a steamer and a sailing vessel, the latter being out of the ship channel and near an edge of shoals, the steamer must be responsible." *Owners of steamer Roanoke, Appellants vs. Ezra Calderwood and others, Libellants,* 19 *How. Rep.* 241. See opinion of *Justice Campbell,* pages 245, 246.

In this last case also, the owners of the sailing vessel, as libellants, recovered full damages in the Circuit Court and the judgment was affirmed by this court.

In the case of *Culbertson, Appellant, vs. the Steamer Southern Belle and others, Claimants*, 18 *How, Rep.* 584, it was held:

"When a regulation was made in one of the harbors of the Mississippi river, assigning their positions to different species of boats, if the regulation was generally known, it was the duty of all persons to conform to it."

"When a flat-boat was moored at the place designated for flat-boats, and a steamboat attempting to land, came into collision with and sunk the flat-boat, the steamboat must be liable for the damages done."

"When a steamer is about to enter a harbor, great caution is required. Ordinary care, under such circumstances, will not excuse a steamer for a wrong done."

In this case the owners of the flat-boat, libellants, recovered damages by the District Court, but the judgment was reversed by the Circuit Court. On appeal this Court reversed the Circuit Court. *Justice McLean* in deciding the case, on page 587, uses this language:

"It is objected that the flat-boat had no lights. She had a light on her deck, as proven by her captain and other witness, fifteen minutes, before the collision, and at the time it occurred; but as she was fastened to the shore, and from the weight of evidence was in her right place, a light was not necessary. Where a boat is anchored in the path of vessels, a light is indispensable; it is not required when the boat is fastened to the shore, especially set apart for such boats."

In case of "The Bridgeport," 14 Wallace, 116, this ruling was made:

"A steamer navigating the East river, opposite Corlaer's Hook, New York, by night, condemned in a collision case for injury done by her to a ship lying in a recess in the Hook, two hundred feet and more outside of the open channel, and three hundred or four hundred feet from the ordinary track of steamers; it being held to be no excuse for the collision that the steamer was rounding the Hook and going into her dock about three quarters of a mile below; that her officers could not see in consequence of a fog which suddenly rolled up, and that they *supposed* they were far enough off the shore and far enough advanced to change their course for rounding the Hook."

" When a boat is fastened to the shore, and out of the proper path of vessels navigating a port, she is not bound, in the absence of harbor regulations requiring it, to keep a light on deck."

In this case, on page 119, *Justice Bradley* uses this language :

"An attempt is made, indeed, to throw the blame on the Margaret Evans herself, because she did not have a light, and because she had no anchor watch. The fact is she had a night watchman on board, and as to a light, we think it is hardly necessary for a vessel lying at a wharf, more than two hundred feet outside of the channel, to anticipate the visit of stray steamboats in the night time and to make provision for such an exigency."

See also on pages 119 and 120 reference to case of *The Granite State*, 3 *Wallace*, 310, to the effect that the harbor regulations of New York did not make it obligatory on barges moored at a wharf to have either a light or a watch; and the colliding steamer in that case was held liable, though it was so dark that the barge could not be seen till close to her, and though at the time the steamer was seeking to avoid contact with other vessels coming out of their docks. Where the question of fault in a collision lies between a vessel at anchor, or at a wharf, out of the track of other vessels, and not derelict in duty, and a steamer navigating a channel of sufficient width for her to moor and stop at pleasure—there being no unusual stress of weather or superior force to drive the latter out of her course—it was held in the case just cited that the fault, under almost any circumstances, could be held to be with the steamer.

We also ask special attention to the case of ***Railroad Co. vs. Transportation Co.**, 32 Ohio St., R.* 116. The Baltimore and Ohio Railroad Company was engaged in the erection of a bridge over the Ohio river at Parkersburg. Five piers had been built, numbering from the West Virginia shore, 1, 2, 3, 4 and 5, No. 5 being nearest the Ohio shore. The deepest water, and what was the usual channel in low water, was between piers 3 and 4, and 4 and 5, but there was water enough to float a boat between any of the spans. On December 7, 1870 the steamer Rebecca, owned by the Transportation Co., coming down the river, ran into a barge moored to the West Virginia side of pier No. 3. The steamboat was sunk. The night was rather "dark and hazy," and there was no light on the barge. This barge was owned by the Railroad Co. and was used in building the bridge.

Suit was brought by the Transportation Co. against the Railroad Co. to recover damages caused by the sinking of the steamboat, and the absence of a light on the barge constituted the negligence complained of.

In the lower court there was a recovery by the Transportation Co. for the loss of their steamboat, but on error, the Supreme Court of Ohio reversed the judgment; holding that as the steamboat was not in the "usual and customary channel of navigation" there could be no recovery, "although the barge was without a light." See the numerous authorities cited in this case, as well those cited by the able counsel, as those referred to by the court.

If such is the rule as to boats, vessels and barges not in the "usual and customary channel of navigation," with still greater force does it apply to the pier of a bridge located under authority of law and that can't be handled and shifted from place to place as a boat can. It has a right to stay, and has to stay in the place where located. Its *location* under such authority is *notice* to those engaged in navigating the river.

If no *light* is required at *night* to mark the place where a boat is moored when not in the "usual course of navigation," still less is a *buoy* required in a "clear, calm morning" with an unobstructed view of objects on both sides of the river familiar to pilots and others engaged in navigation. These objects will be referred to further along when we call attention to the acts of the complaining party.

2nd. The injury complained of was *wholly* the result of the plaintiffs' own negligence.

What was the situation, and what were the circumstances surrounding the parties at the time of the accident?

" For about two weeks prior to the injury complained of the Ohio river had been rising rapidly, and on the morning of the injury (or shortly before that) had attained its highest stage, and higher at that point than it had ever before been known, and was known as the great flood of February, 1883. Business for about ten days had been partially suspended on account of the high stage of the water; but one tow had gone down the river three days before accident." (Facts 3, Record 49.)

This finding is certainly not overdrawn when compared with the historical fact known to all, and of which, we suppose, this court will take notice, as it will in regard to other matters of general knowledge and information. The whole Ohio valley was an ocean of water. There were no landing places, no business in the cities and towns because they were under water. The river was covered with a floating mass of houses, barns, stacks of hay, shocks of corn, any quantity of down timber and freshly uprooted trees from the upper tributaries, and all sorts of driftwood and other rubbish. The suffering and distress of the people was responded to by supplies of food and clothing sent from all parts of the country, and even invoked the aid of the

National Government under an appropriation made by Congress for that purpose.

This was the condition of affairs when the plaintiffs below started out with three fleets of loaded coal barges, towed by three different steamboats, two of which got through safely, while the other met with the accident spoken of. The desire to be ahead of other coal shippers in reaching the market below, and thereby obtain a high price for the coal, doubtless, inspired them to take the risk.

But it was an act of gross negligence on their part to attempt to run their coal to market under such circumstances. This appears from the fact that others engaged in the same business were not willing to take such risks.

The language used in the lower Court in this regard is not as explicit as it might have been. It did not say that for ten days business on the river had been *wholly* suspended on account of the high stage of the water. This would not have been true because the plaintiffs themselves, did not thus suspend business; but the language is that business for ten days had been "*partially*" suspended, not *wholly* because "*one* tow had gone down the river *three days before*;" but the river had been "rising rapidly" during that three days. So it very clearly appears that during this extreme high water but one boat had gone down the river, and that was three days before, when the water could not have been near as high as it was on the morning of the accident.

Again there was no excuse whatever for running upon pier D. True it was seven or eight feet under water, but they reached there at 10 o'clock in the morning of a "clear and calm" day, when the steamboat with its tow was "steaming and handling well." There was a space of 500 feet between this pier and pier C next east of it, but this pier, as well as the two east of it, B & A, were all *under water from* 37 *to* 47 *feet.* So there was no want of water from pier D, on the Ohio side of the river, clear across to the West Virginia shore, a distance of 1,200 feet, and clear and free of all obstructions by the piers being built, or otherwise. And in this connection it should be remembered that before the bridge was built the channel of the river was still "further to the left, between piers B & C and near to said pier B," which was 750 feet from pier D, and only 250 feet from the West Virginia shore in low water.

What right had this steamer, with its fleet of coal barges, to be in such a place? What excuse can be given? They were clear to the right of the channel which was established when the piers were located and still further from the old channel. It can not be said they were trying to avoid piers A, B & C to the left, because these piers were from 37 to 47 feet under water, while pier D, upon which they ran, had reached the height of 48 feet and was only 7 feet under water, and the pilot in charge of the coal fleet knew all this. The court found that he was well acquainted with the Ohio river at that point and from Pittsburg to all points below, and *while the work of constructing said piers was going on had passed there twice a week and saw and knew where said piers were located and to what extent the work had progressed and where the channel span had been established and its length,*" etc. (See Facts 7, Record 50.) The *italics* are our own.

But this is not all. The work of building these piers had then been going on for nearly a year, and this pilot and others who had been passing twice a week, not only knew that this pier D had been carried to the height of 48 feet, while all the others to the left were but a few feet above low water; but he also saw them building and completing two piers on top of the bluff bank, one on the Ohio side of the river and the other on the West Virginia side, both of which stood twenty-four or twenty-five feet out of water, and were in plain view. The language of the finding is:

"The pier standing on the Ohio bank, twenty-four feet out of water, was in plain view and was seen by said pilot and others in the pilot-house, and the same was the case as to the pier on the east bank of the river." (Facts 8, Record 50.)

This bank pier on the Ohio side stood 50 feet from the edge of the bank and about 150 feet from pier D on a line level with the cord of the bridge. (Facts 4, Record 49, 50.)

But this is not all. "The village of Point Pleasant and its buildings, well known to pilots and other river men, were also in plain view." (Facts 8, Record 50.)

There were also growing trees on the Ohio side between the top and bottom of the bank, "the tops of which were some distance out of water, that were in plain view and that were noticed by said pilot, but for the distance of a quarter of a mile immediately above and below said bridge the line of trees did not extend." (Facts 8, Record 50, 5.1)

It is further to be noticed that pier D stood in a slight curve of the river, "and at high stages of water it was customary and proper for coal fleets to 'run the points,' running near the shore on the Ohio side at a distance of a quarter of a mile and more above the bridge in descending the river, and bearing out to the left of channel pier D," etc. (Facts 5, Record 50.)

"As the Alarm approached the bridge no halt was made, nor was anyone sent forward in a skiff or otherwise to take observations or make inquiry." (Facts 8, Record 50.)

Under all these circumstances it seems to us too plain to require argument, the injury complained of resulted alone from the plaintiffs' own negligence. But if it can be found that defendants were to *any degree* at fault, still there was at least such *contributory* negligence by plaintiffs as must prevent a recovery.

II.

What was the relation between Casement, Kelley & Co. and the two railroad companies owning the bridge? Were they independent contractors, or was the relation that of master and servant?

The written agreement is set out full in the Record, pages 45, 49 under the head of the 2d finding of facts. The substance of its provisions material to notice are as follows, viz :

The contractors were to construct and furnish all the masonry for six piers for the support of the bridge, to the acceptance of the engineer in charge, "as *may be located and directed* by the engineer of said parties of the first part." (Record, 45, 46.)

They were to furnish all the material necessary for the construction of the piers, "said material to be subject to the approval of said engineer," and the work was to be done and completed according to a certain plan and specifications and subject to the inspection and approval of said engineer. (Record 46.)

The foundation for the piers was to be constructed under the direction and subject to the approval in every part and particular of the engineer of the party of the first part," including as well the *mode and manner* of the construction of said foundations and the material of all kinds used in the construction of said foundations." (Record 46.)

All bolts, clamps, etc., were to be furnished by the contractors and were to be "applied and *fixed in place* as may be directed by the engineer of said parties of the first part." (Record 46.)

The contractors were to be paid for masonry completed in the piers $14.30 per cubic yard, and for work and materials used in the foundations the actual cost and ten per cent. added. And for bolts, clamps, etc., they were to be paid the actual cost and ten per cent. added. (Record 46.)

"The masonry in the piers will be commenced at such depth and upon such foundations as may *hereafter* be decided upon by the engineer." (Record 47.)

"The bridge seats and tops of piers will be finished with a coping course of such dimensions and projections as may be ordered by the engineer." (Record 48.)

"All material used in the work, including stone, cement and sand, will be subject to the inspection and acceptance of the engineer, who will submit them to such tests as he may desire." (Record 48.)

"The work throughout will be executed in the most thorough, substantial and workmanship manner, under the direction and supervision of the engineer of the company, who will give such directions from time to time during the construction of the work as may appear to him necessary and proper to make the work complete in all respects as contemplated in the foregoing specifications. Said directions of the engineer will in all respects be complied with." (Record 49.)

"The engineer will also have full power to reject or condemn all work or materials which, in his opinion, do not conform to the spirit of the foregoing specifications, and shall decide every question that may arise between the parties relative to the execution of the work, and his decision in the nature of an award shall be final and conclusive on both parties to this contract." (Record 49.)

It will thus be seen that the contract did not cover any definitely defined *job of work* at a fixed compensation. The bridge company retain direction and control over the *mode* and *manner* of doing the work. The contractors were simply to go to work and furnish the stone and build the piers. The size of the piers, their shape their height, and the depth of the foundations were not then determined, nor were they provided for, but in the language of the agreement they were to be built "as *may* be *located* and directed by the engineer."

The foundations of the piers were to be commenced at such depth "as may *hereafter* be decided upon by the engineer," and they were to be constructed under the direction of the engineer and subject to his approval, including the "*mode and manner*" of construction. The bolts and clamps were to be "fixed in place as *may* be directed by the engineer."

There was no fixed price for the work agreed upon, but whatever the masonry should amount to was to be paid for at so much a perch. Other work was to be paid for what it *might cost* with ten per cent. added.

It will be observed that under the contract the contractors were not charged with with the duty of keeping lights or buoys on the piers. That was not a part of the work contracted for, but remained with the bridge company as found in the 10th finding of facts. (Record 51.)

"From said finding it will be seen that the railroad companies provided, employed and paid for the services of a chief and an assistant engineer to superintend the work, one of whom was always on the ground and gave directions as to the *mode and manner* of constructing said piers and decided as to the quantity of stone, the height and size and shape of the piers," etc.

"Said railroad companies, through said engineers, as their agents, duly authorized, took charge of, directed and controlled as to providing buoys and lights to be kept upon said piers, the character of the same and the mode and manner of fastening them in place." (Facts 10, Record 51.)

The further fact found by the Court as to the subsequent parol agreement made in relation to keeping up said lights and buoys as referred to in said 10th finding of facts, will be noticed hereafter.

Such being the facts, what is the law?

While it is sometimes, under a nice shading of facts, difficult to determine whether the relation is that of superior or subordinate, or that of independent contractor, yet it is difficult to perceive how any such difficulty can arise in this case.

As the injury complained of resulted alone from the alleged want of a buoy floating over pier D at the time of the accident, we may for the purpose of argument admit this was an act of negligence for which there can be a recovery, but against whom, the railroad companies, as owners of the bridge, or against the contractors?

Under the terms of the written contract, as we have shown, the matter of furnishing, putting up and keeping up lights and buoys *was no part of the work contracted for*, but was a duty that remained to be discharged by the railroad companies as they saw proper. And in this connection the Court in its 10th special finding of facts (Record 51) found that "said railroad companies, through said engineers as their agents, *took charge of, directed, and controlled as to providing buoys and lights to be kept upon said piers, the character of the same and the mode and manner of fastening them to said piers and keeping them in place.*" (The italics are ours.)

Now upon this state of fact the Court found as its first conclusion of law "that the defendants, *by the terms of the written agreement* made with said railroad companies, are independent contractors, and are liable to the plaintiffs for the injury complained of." (Record 52.)

We respectfully submit this is not the law.

In the case of *The City of Cincinnati vs. Stone*, 5 O. St. R. 38, it was decided that:

"The liability of one person for damages arising from the negligence or misfeasance of another, on the principle of *respondent superior*, is confined in its application to the relation of master and servant, or principal and agent, and does not extend to cases of independent contractors not creating those relations, and where the employer does not retain the control over the *mode* and *manner* of the performance of the work under the contract.

"2. But where the employer retains the control and direction over the *mode* and *manner* of doing the work, and an injury results from the negligence or misconduct of the contractor, or his servant or agent, the employer is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent."

In the above case it was held that the parties doing the work were not independent contractors, but that the city, as employer, was liable. See terms of the contract, pages 38 and 39.

In *Tiffin vs. McCormick*, 34 O. St. R. on pages 642, 643, *McIlvaine J.*, in defining the relation between contracting parties, says:

" But we are of opinion that the true relation between the city, as proprietor of the stone quarry, and Ardner, was that of master and servant, instead of employer and independent contractor within the principle of the rule above stated. There was no 'job' or defined quantity of work contracted for," etc.

In *Carman et al. vs. Railroad Company*, 4 O. St. R., on pages 414 and 415, *Raney J.*, in defining the relation of independent contractor uses this language: "The contractor assumes this position, leaving the employer no control over the work, or the persons by whom it is executed, but simply the right to require *the thing produced or the result obtained, to be such as the contract has provided for*. But although as between the parties, the relation may be that of employer and contractor; still if the employer retains the power of superintending the work, and directing it to be done as he sees fit, the decided weight of authority is, it becomes his duty to see it done in a careful and skillful manner; and if he fails in this, he fails to perform his duty to third persons, and is liable for the injury they may sustain."

In *Pickens & Plummer vs. Deicker & Bro.*, 21 O. St. R., on page 215, in speaking of this relation, *White J.*, uses this language:

" The general rule is that the master is liable in law for the negligence of the servant, through whom, in legal contemplation, he is said to act while in his employment. But where the person employed is in the exercise of an independent employment, and not under the immediate control, direction, or supervision of the employer, the latter is not liable for the negligence of the former."

And further, in speaking of the authority and control over the work by the employers, he says:

" It was not necessary that they should, in fact, exercise such control. If they had the authority to the extent indicated, the fact that they chose to leave the details to his discretion would not alter the relation of the parties. We think Wright was a mere servant or agent, and can not be regarded as a contractor within the meaning of the cases bearing on the subject. *His contract of employment did not bind him to produce any given result.*" (The italics are our own.)

The cases above cited are in harmony with *Sherman & Redfield on Negligence*, *Wood on Master and Servant*, and other elementary works, and numerous cases therein cited.

Bear in mind the question we are now considering is simply whether "*by the terms of said written agreement*" the defendants below were independent contractors as found in the 1st conclusion of law (Record 52), such written agreement to be viewed in the light of the fact that such agreement itself did not cover the work of furnishing buoys and lights and putting them up and keeping them in place, but on the contrary, as found in the 10th finding of facts (Record 51), these duties were to be exercised by the railroad companies themselves, and they in fact "took charge of, directed and controlled as to providing buoys and lights to be kept upon said piers, the character of the same and the mode and manner of fastening them to said piers and keeping them in place."

It is hard to see how a contractor under the *terms* of his agreement is liable for negligence as to work *not covered by his agreement*, but is to be done by the employer himself, or some one else employed by him.

But it was not only held that defendants below stood as independent contractors under the terms of the "written agreement" and were, therefore, liable, but it was further found as conclusions of law as follows:

"That the agreement made by defendants with said railroad companies to furnish the material and do the work in preparing, putting up and keeping up said buoys and lights on said piers created the relation of independent contractors and made the defendants liable to the plaintiffs for the injury complained of." (Law 2, Record, 52.)

The "agreement" spoken of in the above clause was not the *written* agreement before referred to, but a parol agreement subsequently made between said *engineer* of the railroad companies and the defendants below. This arrangement is described in the 10th finding of facts (Record, 51, 52) and is as follows, viz.:

"Said railroad companies, through said engineers as their agents, duly authorized, took charge of, directed and controlled as to providing buoys and lights to be kept upon said piers, the character of the same and the mode and manner of fastening them to said piers and keeping them in place. Said engineers of said railroad companies, however, *employed the defendants* to furnish the materials and perform the work in preparing said buoys and lights and in putting them up and keeping them in place *when and as directed by said engineers.* The defendants were paid for such materials and work, an account of which was kept by defendants, and was carried into their monthly bills with the stone work, and was settled and paid for with the other work."

"Prior to said accident said engineers had given to the defendants such directions as to the character of such buoys to be used and as to the mode and manner of putting them and keeping them up, and it was the duty of defendants to see that they were kept up and replaced when washed away under said instructions previously given without waiting for future instructions, and which they had undertaken to do."

This arrangement between the engineers and defendants below, in no way made the latter independent contractors as to buoys and lights. They undertook to do this work, but at all times it was to be done "*when, and as directed by said engineers.*"

These engineers might well believe that while at an ordinary stage of water and under ordinary circumstances such a precaution was necessary, yet it was not necessary at the time of the "great flood," when, evidently, it must have been difficult, if not impossible, to work through the mass of floating drift to replace a buoy that during the night had been washed off and gone miles down the river, and especially when no boats had passed for *three days*, and when in *day-light* there were such plain objects in sight on both sides of the river to mark the location of the pier.

The work was to done "*when*" directed by the engineers. They were on the ground before and at the time of the accident and knew that no attempt was being made to replace this buoy, and they gave no *directions* to replace it. They evidently thought it was wholly unnecessary or impossible to do so.

True, instructions had previously been given as to the character of these buoys and the manner of putting them up and keeping them up, and the court finds it was the duty of defendants under these prior instructions to have replaced the lost buoy.

But under the extraordinary circumstances then surrounding the parties the defendants could well expect further directions would be given if the engineers thought an effort should be made to replace the lost buoy. The fact that they were on the ground and gave no such direction shows conclusively that they did not *then* require it.

But whether such instructions were given at any time or not in no way alters the case. The ground of liability is that the party doing the work is acting under the authority and control of the employer as to the mode and manner of doing the work. If his instructions are followed he is liable because it is done under his direct authority, but if they are disregarded then he is liable because the injury complained of results from the negligence of *his* servant.

"The master's orders to his servant to be cautious cannot relieve him from respontibility. The master is bound to see that he *is* cautious; by intrusting him with a dangerous engine, if not properly used he assumes the risk of his careless use of it; as a locomotive, a horse and carriage, fire arms, or anything that if improperly used may produce injury to others. *Wood on Master and Servant. See* 283.

In *Railroad Company vs. Derby,* 14 *How. U. S. Rep., Grier J.,* well illustrated the absurdity of the doctrine, that a master, by giving express directions for the doing of an act, could shield himself from the consequences if his directions were departed from by the servant. He said: "Such a qualification of the maxim *respondeat superior* would, in a manner, nullify it. A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline and the most exact and perfect obedience to every rule and order emanating from a superior can insure safety to life or property. * * * If such disobedience could be set up by the railroad company as a defense when charged with negligence, the remedy of the injured party would, in most cases, be illusive, discipline would be relaxed and the danger to the life and limb of a traveler greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safely." See also *Wood on Master and Servant,* sections 279, 280, 281, 282, 283.

We submit that the judgment of the Circuit Court should be reversed and judgment rendered for plaintiffs in error by this Court.

W. A. HUTCHINS AND
J. W. BANNON,
Attorneys for Plaintiffs in Error.

U.S. 615

Office Supreme Court U. S.
FILED.
MAR 13 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 173.

J. S. CASEMENT & CO. . . . .

Plaintiffs in Error.

VS.

SAMUEL S. BROWN AND HARRY BROWN,

Partners as W. H. BROWN SONS, *Defendants in Error.*

BRIEF FOR DEFENDANTS IN ERROR.

THORNTON M. HINKLE,
Attorney for W. H. Brown Sons.

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J. W. BANNON,
Attorneys for Casement & Co.

COMMERCIAL GAZETTE JOB PRINT.

SUPREME COURT OF THE UNITED STATES.

J. S. CASEMENT & CO., *Plaintiffs in Error*,

vs.

SAMUEL S. BROWN AND HARRY BROWN, Partners as
W. H. BROWN SONS, *Defendants in Error*.

BRIEF FOR DEFENDANTS IN ERROR.

This Court is asked to reverse a judgment, recovered in the Circuit Court by W. H. Brown Sons, plaintiffs below, against J. S. Casement & Co., defendants below, for the value of three coal-barges and their contents. These were lost by collision with a partly-constructed stone pier in the Ohio River, which was at the time covered by water and unmarked by any buoy or other means to warn off navigators, although defendants had agreed to keep it so marked.

The references are to the printed record.

THE PLEADINGS.

The petition (page 1) alleged the ownership and value of the property lost; that on February 13, 1883, it was being towed down the Ohio, a navigable river and a common and public highway; that defendants were then engaged in constructing a bridge; had partially erected at various points in the channel four stone piers; that thereby the said river and the free use and navigation thereof were obstructed; that the piers were then covered and wholly concealed by water, and were negligently left by defendants without buoys or other means to mark their location and warn navigators thereof; and that thereby, without fault of plaintiffs, the barges struck one of the piers, and the loss was caused; for which judgment was asked.

The answer (p. 7), while denying all the allegations of the petition except the one that the Ohio River was a common and public highway, alleged that defendants were building the piers under a contract with two railroad companies, and under the supervision of their engineers, as required by the contract, upon plans and in locations authorized by law; that the locations of the piers were plainly visible and well known; and that the negligence of plaintiffs' officers and servants contributed to the injury complained of.

The reply (page 7) put in issue these allegations of the answer.

The case was submitted to Judge Jackson, and on May 12th was entered a general finding for the plaintiffs on the issues joined (p. 44). A motion for a new trial was filed and overruled, and judgment was entered on November 14, 1888. With the judgment entry were made certain special findings (pp. 44–63).

THE FACTS.

The facts of the case, briefly stated, are as follows: Early in the year 1882 two railroad companies obtained authority to construct the bridge across the Ohio River at Point Pleasant. Its plans, and the number, size, location, and construction of its six piers, were as authorized and directed by officers of the United States (p. 45).

Two of the piers stood on top of the bluff banks of the river, one on each side. The other four, known as A, B, C, and D, were between the banks—A at low-water mark on the West Virginia side, B 250 feet west therefrom, C 250 feet west of B, and D (the one struck) 500 feet west of C, at low-water mark on the Ohio side. The space between C and D was designated as the channel span. By low-water mark is meant extreme low water. At ordinary stages the water intervenes between D and the Ohio bank.

The companies by written contract employed Casement & Co. to furnish the material and build these piers and their foundations according to the plans and specifications, subject to inspection and approval by the engineers of the companies, and to bear all expenses incident to or connected with the work of construction (pp. 45–47).

They later employed Casement & Co., by a separate agreement and for additional compensation, to furnish the materials and to prepare and maintain on the piers buoys by day and lights by night to warn passing boats and water-craft of danger when and as directed by the company's engineers. Prior to the collision the engineers had given such directions as to the character of the buoys and lights, and the mode and manner of putting and keeping them up and replacing them, that it was the duty of Casement & Co., without further instructions, to keep them up and replace them when washed away. They had undertaken so to do (p. 52).

On February 13, 1883, they had completed the two piers on the banks, but were still engaged in constructing the other four. The latter, but not the other two, were then covered by the high waters of the flood of that month, which had attained its highest stage on that morning, or shortly before it.

During the work Casement & Co. had maintained the buoys and lights, and had replaced them, when, some days prior to the accident, they had been carried off.

But on the night preceding the accident, "*or the night previous to that*," the buoys were again washed away, and they did not replace them (p. 51).

The fact of their absence was known to them early on the morning of February 13th, if not before then. They had ample time to replace them prior to the accident, but made no effort to do so, nor did they adopt any plan to warn approaching boats of their absence (p. 51).

On that morning W. H. Brown Sons' steamer "Alarm," with a tow of seven barges, came down the Ohio River, and reached the bridge about ten o'clock A. M. The morning was clear and calm, the water smooth, and the boat and tow steering and handling well. Four other pilots were in the pilot-house on the lookout, and aiding the regular pilot then on watch in the attempt to pass the bridge safely. One other man was on the lookout on the extreme front of the tow. All were exercising reasonable and proper care in the management of the tow and in selecting the course.

There were no buoys on the piers, nor any breaks in the water above them to indicate their location. There were visible, it is true, the two bank piers and other distant objects, and the tops of a line of trees on the Ohio bank; but these trees did not come to within a quarter of a mile of the bridge on either side above or below, and with the other objects were only useful in an attempt to calculate with very vague data the exact location of the piers.

The front barge struck pier D, and it and two others and their contents were lost to plaintiffs' damage in the sum for which the judgment was rendered.

It will be seen that, in addition to the ordinary duty to travelers devolving upon one who obstructs a highway, the defendants also assumed a special contract duty in the premises. They undertook and were paid for the work of so marking the piers as to prevent such collisions.

The Court found them negligent in the discharge of these duties and liable, and that those in charge of the tow were not guilty of negligence, and especially not chargeable therewith, in failing to make accurate calculations from the objects in view.

No bill of exceptions was taken. But as the case was transferred from the State Court to the Circuit Court, the transcript contains copies of some testimony which was taken before its removal.

The errors alleged are the conclusions:

1. That Casement & Co. by the terms of the written contract were independent contractors, and were liable.

2. That the verbal agreement made them independent contractors and liable to plaintiffs.

3. That it was their duty to keep buoys on the piers, and if washed away by drift or otherwise to replace them, or to adopt some plan to warn approaching boats; that the failure to do this constituted negligence; that under such circumstances those in charge of the boats were not chargeable with negligence in failing to make accurate calculations as to the location of the pier from the objects in view.

4. That W. H. Brown Sons and their agents exercised reasonable and proper care and were not guilty of contributory negligence, and that the boat and tow were in the usual and proper place of navigation at that stage of the water.

5. General error in findings 1, 2, 3, and 4.

6. That W. H. Brown Sons were entitled to judgment.

7. That upon the pleadings and facts judgment should have been for Casement & Co.

I.

These assignments are too general. (Van Stone *v.* Manufacturing Co., 142 U. S. 133.)

II.

The general finding was not set aside nor in any way modified. The special findings reviewed the facts somewhat in detail and drew five conclusions. The record remains with a finding (p. 44) of all issues in favor of the plaintiffs, followed by some intermediate matter in no way affecting that finding and then by the judgment (p. 52) in favor of plaintiffs.

If there were any defect or omission in the special findings, the general finding would cure it.

If they failed to pass upon all material issues, the proper remedy was not a motion for a new trial, but an application for further findings.

They are controlled by the general finding.

The E. A. Packer, 140 U. S. 363.
Furrer *v.* Ferris, 145 U. S. 132.
Mining Co. *v.* Mining Co., 139 U. S. 222.
Neath *v.* Commissioners, 109 U. S. 268.

On this record every question of fact is resolved in support of the judgment.

If upon any findings the judgment was right, it stands, no matter what reasons the Court may have assigned or what additional conclusions it may have drawn. Hence it is immaterial whether conclusions 1 and 2 are or are not wrong. A difference in their language will be noticed. The first states that defendants, by the terms of the written agreement, are independent contractors, and are liable to plaintiffs for the injury, while the second expressly states that the verbal agreement made them liable.

If the case had been to recover a judgment against the railroad companies, then these two conclusions might be important. The servant might make the master liable where the independent contractor would not. But that is not this case.

III.

The Ohio is a navigable river. It is therefore a public highway. The duty of one obstructing a highway is familiar law, and has been fully recognized by the courts. (Penn. *v.* The Wheeling Bridge Co., 13 How. 518.)

"The rivers of this State, to the extent that they are navigable, are public highways." (Hickok *v.* Hine, 23 O. S. 523.)

For loss sustained by navigators in consequence of an obstruction to navigation, those causing it are liable although they use due diligence to prevent such loss.

Further, these rights are also secured by solemn compact. The Ohio and other navigable rivers in the Northwest Territory are protected by the Ordinance of 1787. (Hogg *v.* Z. C. & M. Co., 5 Ohio, 410.)

IV.

The construction of the piers was an obstruction in this highway.

It was such an obstruction that those concerned in their erection entered into the agreement (par. 10, p. 51) to prevent accident from collision by maintaining buoys and lights upon them to warn travelers. Before their construction the usual channel was between the points occupied by piers B and C; afterward it was between C and D; so that this work made necessary a change in the usual course of travel. It was necessarily an obstruction.

The right to use the river as a highway extended to all parts of it, although it might be negligence to travel willfully outside of the usual channel.

No such negligence occurred here. There was an unusual number of pilots and lookouts on the watch, and they were, as found by the Court, exercising unusual diligence and care, and were taking the usual and proper course (pp. 50, 52). In endeavoring to run the point and yet avoid the piers they necessarily kept near the Ohio shore.

The obstruction was not by one engaged in the ordinary use for which the river was set apart—namely, as a highway for navigation.

The cases cited in the brief for plaintiff in error excusing the absence of lights were those of vessels engaged in the exercise of this ordinary use, to whom all other navigators owe reciprocal duties.

Building a pier in its bed is not use of the river for the purpose of navigation. Those engaged in so doing are subject to liabilities beyond those affecting navigators. (Railway Co. *v.* Telegraph Association, 48 O. S. 390.)

The Court (in 32 O. S. 116) were not considering the necessity of lights upon piers. The piers in that case did have lights (p. 151). They were considering the necessity, under the circumstances of that case, of such a light upon a barge engaged in the use of the river for navigation, and found that, notwithstanding its absence, the pilots were guilty of such negligence as not to warrant a recovery against the barge.

The differences are well illustrated (p. 138) by the liability thrown upon one who left a log far outside the channel, yet at a point where vessels could go and did go. (Porter *v.* Allen, 8 Ind. 1.)

The fact found, that C to D was established as a channel span, means nothing more than that the space between those piers was required to be high enough and broad enough to permit free passage by boats.

There is a flood channel as well as a low-water channel. (Crawford *v.* Rambo, 44 O. S. 282.) I do not know how accurate the plat attached to plaintiffs' brief may be. It is not taken from the record. But I notice that the low-water mark designated in it is "extreme" low-water mark. So I take it there may be a third channel — extreme low-water channel.

We have then an obstruction right on the edge of that channel, not a long distance from it (as was the fact in the cases cited in the brief), not by barges, boats, or vessels engaged in navigating the river and moored a long distance from its channel for the night.

The boat (in 19 Howard, 63) was "tied in a recess of the land," with a projecting point of land beyond; that in 32 O. S. 116, under the lights of the pier; the others, in inlets, or tied to the bank or to the shore, "especially set apart for such boats" (p. 17 in brief). All were above and not beneath the water.

V.

Authority from Congress to construct this bridge did not lessen the duty or diminish the care required. Without such authority the work would have been a public nuisance.

In either case the liability to travelers remains the same. The act gave no authority to obstruct navigation, for the work could reasonably be conducted so as to avoid obstruction. (Hickok *v.* Hine, 23 O. S. 523.)

Those who lawfully engage in a work in a highway are bound to so conduct and protect the work that no injury shall happen to those traveling therein.

"Neglect is criminally careless," "They must exercise the highest degree of care," "They are bound at their peril to do so," are expressions used in the cases.

Woodman *v.* R. R. Co., 149 Mass. 335.
R. R. Co. *v.* Morey, 47 O. S. 207.

The reason is plain. Highways are designed for a special purpose—that is, for travel. Whoever uses them for another purpose, whether by license or not, interferes with the natural or established order, and must conduct his work accordingly.

The cases are numerous, including obstructions both of roads and of navigable rivers on the edge as well as in the center of channels or sidewalks.

Gleason *v.* Virginia M. R. R. Co., 140 U. S. 439.
District of Columbia *v.* Woodbury, 136 U. S. 450.
Water Co. *v.* Ware, 16 Wallace, 566.
P. W. & B. R. R. Co. *v.* T. B. Co., 23 Howard, 209.
City of Boston *v.* Crowley, 38 Fed. Rep. 202.
The Modoc, 26 Fed. Rep. 718.
C. H. C. & I. Co. *v.* Tucker, 48 O. S. 42.
E. & T. H. R. R. Co. *v.* Crist, 116 Ind. 446.
Mayor, etc. of Birmingham *v.* McCary, 84 Ala. 466.
Jung *v.* City, 74 Wis. 547.
Ellis *v.* McNaughton, 76 Mich. 237.
Charlock *v.* Freel, 125 N. Y. 357.

If the guard has been removed by some occurrence or agency, the duty is to restore it immediately upon having notice. (District of Columbia *v.* Woodbury, 136 U. S. 450.)

This is also familiar text-book law.

Elliott on Roads and Streets, pp. 27, 28.

Wood on Nuisance, sec. 130.

Dillon on Municipal Corporations, sec. 1029, *et seq.*

What is sufficient time after notice is purely a question for the trial court.

In this case that court expressly found (p. 51) that there was ample time to restore the buoys; but no effort was made.

While the flood may have been an unusual one, it had passed its height (p. 14). It was not impossible to maintain them. If it had been impossible, there was ample time also to give warning by some other means.

VI.

Their contract relations with the railroad companies did not relieve Casement & Co. from liability. On the contrary, they added to the sanctions of their implied duty the obligations of a contract, which they commenced to perform, but did not well perform.

The liability resulted from the nature of the work they had undertaken—that is, to build in this river certain piers. The necessary result would be to obstruct the highway. It was certain that from time to time during its progress the incompleted piers would be covered by high water, and that if they were left unguarded by night or by day, injury to travelers would be the natural and probable consequence.

In undertaking such a work and in doing it, they undertook to take proper precautions to prevent such injury.

They were working in a highway. Their inducement or motive was immaterial, as was their relation to the prime mover. Their obligation to travelers could in no way be narrowed or broadened by the nature of their contract, or the circumstances under which they were doing the work, or by the fact that their compensation was pay for what they did rather than a share as owner in the profits of the bridge.

This was a duty imposed upon them by law, irrespective of their contract, for neglect of which they were liable to third persons. (Water Co. *v.* Ware, 16 Wallace, 566.)

This point is touched upon in many of the cases already cited. I may add the following:

Mechem on Agency, secs. 539, 569, 570, 572.
Delaney *v.* Rochereau, 34 La. Ann. 1123.
Campbell *v.* P. Sugar Co., 62 Me. 552.
Carey *v.* Rochereau, 16 Fed. Rep. 87.
Sherman & R. on Negligence, pp. 111, 112.
Wharton on Negligence, pp. 83, 535, 578, 780.
Bishop on Non-Contract Law, secs. 602, 607, 962.

If, as already suggested, the case were against the railroad companies, the doctrines dwelt upon at such length in the brief for plaintiff in error might have some pertinence. They apply only where it is sought to make the superior respond, to make him liable for something he has not personally done or left undone. His relations to the work may be such as to render him "equally liable" with the agent or servant he employs.

Robbins *v.* Chicago, 71 U. S. 657.
Water Co. *v.* Ware, *supra.*
R. R. Co. *v.* Morey, 47 O. S. 207.
Clark *v.* Fry, 8 O. S. 358.

VII.

It was misfeasance and not non-feasance of which Casement & Co. were guilty. They undertook—

1. To build the piers. This involved the exercise of care to prevent injury to travelers.

2. Further, they undertook by special contract to do the work of protection.

They entered upon the work under each contract, but suddenly abandoned the latter and "suffered things to remain in a dangerous condition." They adopted no means to prevent the injury sure to come from their act, and neither the size of the flood nor its nature presents any excuse for their negligence.

"But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequences of his acts; and he can not by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance, or doing nothing, but it is misfeasance, or doing improperly."

Osborne *v.* Morgan, 130 Mass. 102.

"Irrespective of his relations to his principal, he was bound while doing the work to so use the premises, including this sidewalk, as not to injure others."

Ellis *v.* McNaughton, 76 Mich. 237.

Woodman *v.* M. Ry. Co., 149 Mass. 335.

Park *v.* Bd. of Com., 3 App. Ct. Rep. (Ind.) 536.

On p. 31 the brief indulges in suppositions not justified by the record or testimony as to the engineers' presence, thoughts, directions, the impossibility of the work, etc., etc. The finding is express that it was possible to restore and maintain; that there was ample time to do so; and that the defendants were not to wait for further directions. It had been done previously, and could be done again (pp. 51, 52). If we are to suppose or infer, I venture to suggest suppositions more in the line of the testimony that happens to be printed with the record.

VIII.

W. H. Brown Sons were not guilty of negligence.

They acted with unusual care and exercised every precaution. They failed to avoid the pier simply because Casement & Co.'s neglect deprived them of the only sure protection to which they were entitled—namely, the presence of the buoys upon these piers. (Harris *v.* Town of Clinton, 64 Mich. 447.)

The pleadings squarely raise the issue of negligence and of contributory negligence. They were both questions for the trial court to pass upon, and upon both of them it found against Casement & Co.

Findings with reference to negligence are findings of fact and not of law.

Where the question of negligence is not wholly free from doubt, the question is one of fact.

"What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact to be determined under all the circumstances."

"It must be remembered that in cases turning upon questions of fact, in order to reverse, we must be prepared to hold that the findings were not justified."

"Conduct is to be judged not by the event, but by the circumstances under which they acted."

Briggs *v.* Spaulding, 141 U. S. 132.

The plaintiffs in this case are not to be condemned simply because the tow struck the pier.

An error of judgment *in extremis* due to default of the other party is not negligence. (The Nacoochee, 137 U. S. 330.)

In such a case the defendants' negligence is the sole juridical cause of the injury.

D. T. & W. Co. *v.* Daudelin, Ill. (Oct. '92), 32 N. E. R. 258.
4 Am. and Eng. Ency. Law, 49.

Counsel fail to appreciate the effect of finding 5 (p. 50) as to "running the points."

The curve in the river at this point made it the proper course for the pilot to run "as near" (there is an omission by clerical error here) the shore of the Ohio side, commencing a quarter of a mile above the bridge, and then to gradually approach the other shore, until at a point two miles below the tow should near the Virginia shore—in other words, it was necessary here at the bridge to hug the Ohio shore (p. 50).

The curve made it necessary to do so, and it would not do to veer over too far in the direction of pier C, for the difficulties to be met below the bridge were to be carefully guarded against and prepared for.

Further, proper regard to the mass of drift the brief describes, which naturally floats along near the center of the river, would lead prudent pilots to keep near the shore.

Possibly the flood of 1884 (which far exceeded that of 1883) may be responsible for the lurid picture drawn of the latter in the brief. It does not derive its color either from the record in this case or from memory of the evidence.

One at all familiar with the past fuel famines will find nothing to criticise in any attempt to hasten the coal supply to its destination.

The record discloses no haste on the part of those in charge of the tow that was either negligent or suggestive of negligence.

The incompleted pier, covered with water, differs very materially from a barge lying at night far outside of the ordinary course. The latter may be discovered by a diligent lookout. A submerged pier could not be, unless by a buoy or break in the water.

The brief argues that they should have so guided the course by certain objects as to avoid the pier. These were all at great distances. They could not all have been used at once. It may have been too late to use some of them and too early to use others. The curve of the river (p. 50) and the line of the bridge may have prevented such use of the bank-pier until it was too late.

The ordinary appearance of things was entirely changed by the high water. These objects might help one endeavoring to avoid the pier; but how much the help and how well it was used was for the trial court to decide in view of all the testimony. On that testimony that court found that they were not negligent, in failing under such circumstances.

A mathematical expert, by delicate instruments and calculations, it is true, might determine the exact point of its location by comparison with other visible objects, if he had time; but I submit that the law does not require this. Its remedy is much simpler, and that is to require the one who introduces the foreign element into the highway to see that its position is made known.

All difficulty would have been prevented and all uncertainty removed by the presence of a buoy. Such a buoy need be nothing more than a sharpened stick held by a chain fastened to a heavy rock anchored on the top of the pier.

The fact that buoys had been maintained all along, and replaced when removed, justified the pilots in believing that they would find them in place at the time of this collision. Attempting to pass under the circumstances was not negligence. (Finn *v.* City of Adrian, Mich. (Nov. '92), 53 N. W. R. 614.)

All these are questions to be determined by the trial court.

Preston *v.* Prather, 137 U. S. 604.
Furrer *v.* Ferris, 145 U. S. 132.
Schild *v.* C. P. R. R. Co., 133 N. Y. 446.
Kelly *v.* Blackstone, 147 Mass. 448.
Chappel *v.* Bradshaw, Md., 13 Atl. Rep. 50.
See list of cases not reported, after page xii of 68 Md. Reps.
Hogg *v.* Z. C. & M. Co., 5 Ohio, 410.
Jung *v.* City of Haven Point, 74 Wis. 547.

This record presents no reason for this proceeding in error beyond delay. (Mining Co. *v.* Starr, 141 U. S. 222.)

I submit that the judgment should be affirmed with interest, and under the facts with penalty.

THORNTON M. HINKLE,
Attorney for Defendants in Error.

MARCH, 1893.

148 U.S. 615

Office Supreme Court U. S.
FILED.
MAR 18 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

J. S. CASEMENT & CO., *Plaintiffs in Error*,

vs.

W. H. BROWN SONS, *Defendants in Error*.

SUPPLEMENTAL BRIEF FOR W. H. BROWN SONS.

I submit the following as a supplement to my brief already filed, which was necessarily hurriedly prepared under the impression that the time for argument was nearer at hand.

I.

The trial court found absence of negligence in W. H. Brown Sons, and the presence of it in Casement & Co. These were ultimate facts.

The finding, that no halt was made by the tow and that no skiff was sent forward, etc. (p. 50), and the one that certain objects were visible, needed to be supported by further evidence before the ultimate fact that the pilots were negligent can be deduced from them.

The first requires that we know when it was discovered that there was no buoy where the tow then was, the particulars of the current, and the possibility of holding the tow safe while halting.

The second, that we should know that the objects, including the pier, were so located that they fully supplied the place of buoys, and could be calculated from; that the pilots made no use of them, or used them negligently. Knowing these things, we might then deduce negligence; without them we can not.

The record does not so present the facts that the questions found in the brief for Casement & Co. can be raised.

Raimond *v.* Terrebonne Parish, 132 U. S. 192.
Martinton *v.* Fairbanks, 112 U. S. 670.

It is not found that the pilots did not make use of the visible objects, or that they used them negligently, as possibly the brief of planitiff in error implies. The finding is not that they made no attempt at calculations, but that their calculations did not succeed.

See also L. S. & M. S. R'y Co. *v.* Murphy, decided by the Supreme Court of Ohio, March 7, 1893 (29 Weekly Law Bulletin, 166), to appear in 50 Ohio State Reports.

II.

A plea of contributory negligence really implies negligence on the part of the defendants. It is no defense in an action for injuries which result from gross negligence. The defendants must establish it. If established, it does not preclude recovery if the negligence of defendants was the real substantial cause of the injuries.

III.

A further authority as to obstructions of a highway by introducing a foreign substance will be found in Cleveland *v.* King, 132 U. S. 295.

Further illustrations will be found in the cases of the vessels moored at a wharf: held liable, the one because it allowed its anchor to hang with the flukes below the surface of the water (The Palmetto, 1 Biss. 140); and the other because its mooring-line was beneath the surface (Annette *v.* Foster, 1 Daly, 502).

IV.

In none of the Ohio cases cited in the brief (pp. 27, 28) was there an attempt to hold the agent or servant, or a ruling that because of the doctrine of *respondeat superior* this could not be done. They were all cases against the owner or employer. The doctrine does not exclude or affect the liability of the agent or servant.

Note the last clause of the syllabus in 4 O. S. 400, " . . . . as the company must be held to have assented . . . . it was liable as a *joint* wrongdoer."

The same principle is fully recognized in 34 O. S. 642.

V.

The injured person has his election which to sue. (Bor. of Brookville *v.* Arthurs, Pa., Jan. '93, 25 At. Rep. 551.)

Upon a recovery from the railroad companies for the damages in this case, they could recover over against Casement & Co. The present action simply thus avoided circuity of action. (Bor. of Brookville *v.* Arthurs, 130 Pa. St. 501.)

THORNTON M. HINKLE,
Attorney for W. H. Brown Sons.

MARCH 14, 1893.

148 U. S. 615

Office Supreme Court U. S.
FILED.
APR 5 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 173.

J. S. CASEMENT AND COMPANY, PLAINTIFFS IN ERROR,

vs.

W. H. BROWN'S SONS, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN REPLY.

W. A. HUTCHINS AND
J. W. BANNON,
Attorneys for Plaintiffs in Error.

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Attorney for Defendants in Error.

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BRIEF FOR PLAINTIFFS IN REPLY.

We wish to notice briefly some of the points made in the brief for defendants in error.

1st. It is said on page six of defendants' original brief that the assignments of error are too general; and *Van Stone vs. Manufacturing Co.*, 142 U. S. 133, is cited.

No one disputes the proposition that a general exception to the charge of the Court as a whole, cannot be considered by this Court. Neither can the overruling of a motion for a new trial in the Court below be assigned for error. But nothing of the kind has been done in the case at bar. No case can be found where the assignments of error are more specific. (Record, pp. 56 and 57).

In this connection it should be noted that in copying these assignments of error into my original brief, on page 15, an *error* was made as to the *fifth* assignment, which as copied in the brief reads as follows, viz:

"5th. Said Court erred generally in its first, second, third and fourth *findings of fact*." This should have been, as shown by the printed record, page 57, as follows, viz:

"5th. Said Court erred generally in its first, second, third and fourth *conclusions of law from the special findings of fact*."

It is also true that a motion for a new trial was filed in the lower Court, based upon certain specified grounds as to both law and fact, but the *overruling of this motion is not assigned for error.* Of course, we well knew this could not be done in this Court. So far as the lower Court was concerned it was entirely proper to call attention of the Court to the rullings complained of and ask for a new trial.

2d. On page 6 of original brief for defendants it is claimed that the special findings of fact do not cover the whole case, and that the judgment can be sustained upon the "general finding," and an entry under date of May 12th, 1888, (record, p. 44) is referred to.

This is simply the preliminary finding of the "issues joined for the plaintiffs" and of the amount due. Whereupon, after a motion for a new trial had been filed and overruled, the general entry was made in the case commencing on the same page, 44, of the record. This entry shows that trial by jury was waived and the case submitted to the court under a request to have a special finding of facts, and that the conclusions of fact and law be found and stated separately, which was done. Then follows the special findings of conclusions of fact upon which the legal conclusions of law are based, or as expressed in the record, page 52, "and as conclusions of law from the *facts thus found*, and *not otherwise*, the court finds," etc.

The court, as it was required to do, certainly attempted to cover all the issues in the case and clearly did so. There was no *issue* whatever made by the pleadings, or otherwise, not covered by the special findings of fact.—Opposing counsel specify none except the finding of the issues in favor of the plaintiff which he calls a "general finding." But this finding is based upon the special findings of fact "and not otherwise." The only issue made by the pleadings related simply to the question of negligence: whether or not there could be a recovery against defendants below *on account of their failure at the time of the accident to have a buoy floating over pier D, or otherwise give notice of its location.*

3d. As to a bridge being an obstruction to navigation (defendant's brief, page 7), I need not cite authorities to show that since the legislation of Congress upon the subject, bridges built across the Ohio river under the direction and supervision of the War Department, as required by law, are not *nuisances*, but are *lawful structures.* They are in the interest of commerce. The case referred to of *State of Pennsylvania vs. Wheeling Bridge Company,* 13 How. 19, has no application. It was not authorized by the General Government at all, but simply by the State of Virginia. It was held to be an obstruction to navigation, in that the piers that supported the structure were not of sufficient height to admit the passage of boats under it. It was ordered to be raised to a certain height by the bridge company, and if not done to be abated.

Hickock vs. Hine, 23 *Ohio State R.* 323, is also referred to. In this case a Plank Road Company undertook to build a bridge across the Grand River in Ohio, in such manner as to *entirely* obstruct the navigation of the river; and it was held this could not be done under its charter, which did not contemplate that one public easement should yield to another more important. And further, that mere authority to build a bridge across a river did not give it the right to totally obstruct navigation, "where the bridge can reasonably be constructed so as not to destroy the navigability of the river."

The case of *Hogg vs. Zanesville Canal and Manufacturing Company,* 5 Ohio 410, was before Congresional action in regard to bridges, and relates to rights under State legislation. It was held:

"A dam erected across a navigable stream under the sanction of a legislative act, if not kept in the condition required by that act, may be regarded as a nuisance, and persons injured may maintain an action as in the case of injury by a nuisance."

The effect of the ordinance of 1787, in connection with the State legislation, was also considered, but, of course, this has no application to *National Legislation.* Where a bridge across a navigable stream is built—under the authority of such national legislation, and its piers have been *located* by the engineers of the government as provided by law, such piers are not a nuisance, no more so than the river itself is a nuisance to crossing commerce. Such commerce passes *upon* the river and *over* the river. Mutual rights and interests are involved. A bridge is not in any proper sense an obstruction to the navigation of the river, but in the interest of commerce qualifies the manner of its use. In the case in hand it was expressly found by the lower court that authority to build the bridge was obtained not only from the National Government, but also from the states of Ohio and West Virginia, and "that the plan of said bridge, the number, size, and location of the stone piers for the same were submitted to the proper officers of the United States Government and were duly approved, and said bridge and piers were located and constructed as authorized and directed by such officers." And further, "that the long span between piers C and D was duly established as the channel *span* after notice duly given and consultation with those engaged in the navigation of the Ohio river, as required by law."

In *Railway Co. vs Telegraph Association*, 48 O. S. 390, I find nothing in support of the point made.

4th. As to whether for the alleged negligence of failing to have a buoy over pier D the suit can be maintained against the contractors or whether it should not have been against their employers, the two railroad companies, opposing counsel on page 12 and 13 of his original brief, and on page 3 of his supplemental brief, seems to suppose that in all cases where the master is liable to third persons for the negligence of the servant, the servant is also liable, and that they are jointly thus liable to such third persons.

This is a clear misconception of the law. The rule is that for mere negligence or *nonfeasance*, as distinguished from *misfeasance*, of the agent or servant the master is liable to third persons, while the agent or servant is not. The master is liable because such acts of the servant must be treated as *his* own acts, while as between the servant and such third person there is no *privity*, hence when the master has paid the damages caused by such negligence of the servant he has his remedy over against the servant. But where the act is *unlawful*, such as a trespass, or other positive willful or malicious wrongful act, then the servant is liable to third persons, and if such act be done under the sanction of the master he is also liable.

The case of *Osborn vs. Morgan*, 130 Mass. 102, cited by opposing counsel, was a case between "fellow servants," and the court simply decided that "one servant may maintain an action for an injury negligently inflicted on him by a co-servant."

The cases are not uniform in relation to the rule as between fellow servants. Those which support this rule laid down in Osborn vs. Morgan base the right upon the ground that for the mutual protection of servants engaged in a common employment where the safety of *each* depends upon the acts of his fellow servants, that an obligation arises as *between each other* founded upon the exercise of ordinary care and skill. See *Griffith vs. Wolframe*, 22 Minn. 185, cited inthe Massachusetts case.

But all this has no relation to the rule of law as between servants and third persons.

As to when the servant is liable to third persons the rule is very clearly stated in the case of *Henshaw vs Noble et al*, 7 O. S. R. 226.

In this case the plaintiff as lessee occupied a store room in Cincinnati in which he had a stock of goods, which were injured by the falling of one of the walls of the building. The falling of the wali was caused by excavating a cellar on a lot adjoining in a negligent manner. The pleadings were drawn so as to cover the action of *case* for "excavating the cellar and street so near to the plaintiff's premises, and in so careless and negligent a manner, as to disturb the foundation and walis of his ware-house, and cause the same to fall, by means whereof his furniture and other personal property were destroyed." There was also a count in trespass *quare clausum fregit*, and adding a destruction of the furniture by way of aggravation.

The action was brought jointly against *Curtis & Brown*, the proprietors, *King & Noble*, their contractors, *Palmer*, their architect and superintendent, and *Higdon*, who was employed to excavate the cellar. *Curtis*, one of the proprietors, and *King*, one of the contractors, died before the trial, and there was a verdict in the lower court against all the others. A motion for a new trial was filed by the defendant, *Noble*, the surviving *contractor*, and notice given in arrest of judgment, in case the motion for a new trial should be overruled. By direction of the trial court these motions were argued together, and reserved for decision in the Supreme Court. A bill of exceptions was embodied in the record, containing the evidence in the case and the charge of the court. There was a question raised under our *code pleading* whether *case* and *trespass* could be joined as separate causes of action in the same suit; but it is not necessary to notice this point here.

On the trial the defendant, *Noble*, the surviving *contractor*, asked the court to instruct the jury that "an action on the case for negligence cannot be maintained by a third party against an agent, where the negligence consists in the omission of a duty imposed."

The court refused this charge as asked, but instructed the jury in lieu of it, that "this was true abstractly, but where there was negligence or improper conduct in the doing of an act, and injury thereby was done to another, that an action could be sustained against the agent."

This was held to be error by the Supreme Court, and for this reason the motion for a new trial (that had been reserved for decision) was sustained, and a new trial awarded.

The rule as to when the contractor, agent or servant is liable for negligence to *third persons* is very clearly defined. And as will be seen while the agent is personally liable to third persons for his own "*misfeasances and positive wrongs*," yet he is not liable to third persons for his "*nonfeasances or omissions of duty in the course of his employment.*" "His liability in these latter cases is solely to his principal, there being no *privity* between him and such third persons; the privity only exists between him and his principal," etc. See opinion on this point in full on pages 232 and 233.

Wood on Master and Servant lays down the same rule. In section 324, page 672, the author says:

"A servant is to be deemed the agent of his employer in all matters within the scope of his employment, and so long as no *unlawful act* is done by him, the authority of the master is a complete defense in an action against him therefor; but if he commits a trespass, or converts the goods of another, or commits any *unlawful act*, whether within the scope of his employment, or by the express command of his master even, he is liable personally therefor, and may be sued alone or jointly with his master."

"But where his act merely results in injury to another, or is a mere consequence of the improper execution of a lawful act, the master alone is liable to third persons therefore; but where the master is himself free from fault, he may have his remedy against the servent for the damages to which he is thereby subjected."

5th. Opposing counsel, on page 14 of his original brief, and on pages 1 and 2 of supplemental brief makes the point that "findings with reference to negligence are findings of fact and not of law."

Just what is meant by this I am at loss to understand. Certainly it can't be claimed that the decision of the trial court upon a question of negligence cannot be reviewed on error in this court.

The case referred to of *Briggs vs. Spaulding*, 141 U. S. 132, which was an equity case that came into this court on appeal with a long bill of exceptions setting out the evidence, raised various questions as to what was negligence on the part of the directors of a National Bank for which they were personally liable. And after ascertaining the *exact facts* the court as *matter of law* held that the acts complained of did not constitute negligence.

Of course, on the hearing of a case in the trial court in an effort to determine *what the facts are*, negligence is often a mixed question of law and fact. But when the *result* of the evidence has been definitely ascertained by special verdict of a jury, or where jury has been waived, by a special finding of conclusions of fact by the court, then the question of negligence or no negligence is purely a question of law.

1 *Sherman & Redfield on Negligence, Secs.* 52, 56.

Railroad Co. vs. Crawford, Adm'r, 24 *O. St.*, 631.

6th. In supplement to defendants' brief, pages 1 and 2, it is claimed that negligence is an "ultimate fact" and that the facts found by the court "needed to be supported by further evidence before the ultimate fact that the pilots were negligent can be deduced from them."

This is simply saying that the facts found were not sufficient to show negligence.

7th. It is further said on page 2 of supplemental brief that "the record does not so present the facts that the question found in brief for Casement & Co. can be raised." In support of this point counsel cites the cases of

Raimond vs. Terrebonne Parish, 132 *U. S.* 192.

Martinton vs. Fairbanks, 112 *U. S.* 670.

These cases are simply to the effect that a statement of facts by the parties, or a finding of facts by the court is strictly analogous to a *special verdict*, and must not set out the evidence, but must show the ultimate facts or conclusions of fact, "so as to present questions of law only." This is the well known rule.

In the case at bar this rule was carefully followed. There is no foundation whatever for the point raised. There was not any attempt whatever to set out the *evidence* by way of recital or otherwise; but on the contrary, it most specifically appears that only the conclusions of fact, or the ultimate facts are stated. The record shows that both parties requested the court to "make a special finding of facts and state its conclusions of law and fact separately," which request was granted; "and thereupon the court finds and states the conclusions of fact as follows," etc. Then follow twelve special findings of conclusions of fact. These are followed by the following words: "And as conclusions of law from the facts thus found, and not otherwise, the court finds," etc. Then follows five separate conclusions of law. (Record 44 to 52.)

8th. Counsel on page 15 of original brief, clearly misconstrues the meaning of the 5th finding of facts, (record, page 50). The clear import of the language used, is that coal fleets in "running the points" come in to near the Ohio shore at the head of the bend, "a quarter of a mile and more above the bridge," and from that *point* "bear out to the *left* of channel pier D and between channel pier D and C," thence quartering across the river and striking the West Virginia side about two miles below Point Pleasant. Opposing counsel says this means that they do not commence "bearing out to the left" a quarter of a mile *above* the bridge, but follow the bend on the Ohio side down *to the bridge*, and then bear out to the left. This would not be "running the points" at all, but running the *bends*. The clear import of the language used is against such construction, and is opposed to well known rules of navigation. Boats save time and distance in "running the points," quartering from shore to shore, instead of hugging the shore along the bends of the river.

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